IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHN LEO CAPISTRANO,

Defendant and Appellant.

S067394

CAPITAL CASE

Los Angeles County Superior Court No. KA034540
The Honorable Andrew C. Kauffman, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

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STATEMENT OF THE CASE

Following the consolidation of two separately filed criminal cases (case nos. KA030671, KA031580) naming appellant, Michael Drebert, Eric Pritchard and Anthony Jason Vera as codefendants, Pritchard and Vera were severed from the proceedings and those charges were consolidated into a third separately filed criminal case (case no. KA034540) pending against appellant and codefendant Michael Drebert.[1/]

On September 25, 1997, the Los Angeles County District Attorney filed an amended 16-count information charging appellant as follows: as to count 1, with the murder of Koen Witters (Pen. Code,[2/] § 187, subd. (a)); as to count 2, with first degree residential burglary (§ 459); as to count 3, with first degree residential robbery (§ 211); as to counts 4 and 5, with the home

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1. Respondent provides a more detailed procedural history relevant to the joinder and severance issues (AOB 136-183) in Argument VII, *post.*

2. All further statutory references will be to the Penal Code, unless otherwise designated.

invasion robbery of Jane Doe[3] and E.G. (§§ 211, 213, subd. (a)(1)(A)); as to counts 6 and 7, with forcible oral copulation by acting in concert against Jane Doe (§ 288a, subd. (d)); as to counts 8 and 9, with forcible rape while acting in concert against Jane Doe (§ 264.1); as to counts 10 and 11, with the carjacking of E.G. and Jane Doe (§ 215, subd. (a)); as to counts 12 and 13, with home invasion robbery of Ruth Weir and Patrick Weir (§§ 211, 213, subd. (a)(1)(A)); as to count 14, carjacking of Ruth Weir (§ 215, subd. (a)); as to count 15, attempted willful, premeditated murder of Michael Martinez (§§ 664/187, subd. (a)); and as to count 16, home invasion robbery of Michael Martinez (§§ 211, 213, subd. (a)(1)(A)). Burglary and residential robbery (§ 190.2, subd. (a)(17)) special circumstances were alleged as to the murder charged in count 1. As to counts 4 through 14, it was further alleged that appellant personally used a firearm (§ 12022.5, subd. (a)) and that a principal was armed with a firearm (§ 12022, subd. (a)(1)) during the commission of those offenses. As to counts 15 and 16, it was further alleged that appellant personally used a deadly and dangerous weapon (§ 12022, subd. (b)), a baseball bat, in the commission of the offenses and that appellant personally inflicted great bodily injury (§ 12022.7, subd. (a)). (3CT 790-801.)[4] Appellant pled not guilty and denied the special allegations. (3CT 802.)

Appellant and codefendant Drebert were tried jointly, but evidence was heard by separate juries. (5CT 1186-1187; 1RT 1001.) Appellant's jury

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3. Although Jane Doe and her husband were identified by their true names at trial and throughout in the appellate record, for privacy reasons, respondent will refer to these victims by their first and last initials.

4. The amended information jointly charged codefendant Michael Drebert with the offenses charged in counts 1, 2, 3, 12, 13, 14, 15, and 16. (3CT 790-801.) Drebert's convictions were affirmed by the California Court of Appeal, Second Appellate District, Division Seven in case number B121548.

found him guilty of murder in the first degree and found the special-circumstance allegations of burglary and residential robbery to be true (§§ 187, subd. (a), 190.2, subd. (a) (17); count 1). The jury also found appellant guilty of first degree residential burglary (§ 459; count 2); first degree residential robbery (§ 211; count 3); five counts of home invasion robbery (§§ 211, 213, subd. (a)(1)(A); counts 4, 5, 12, 13, 16); two counts of oral copulation by acting in concert with force (§ 288a, subd. (d); counts 6 and 7); two counts of forcible rape while acting in concert (§ 264.1; counts 8 and 9); two counts of carjacking (§ 215, subd. (a); counts 10 and 14); and one count of attempted willful, premeditated murder (§§ 664/187, subd. (a); count 15). The jury found the personal use (§ 12022.5, subd. (a)) and principal-armed (§ 12022, subd. (a)(1)) allegations true as to counts 4 through 10 and 12 through 14. The jury further found true the allegation that appellant personally used a deadly and dangerous weapon (§ 12022, subd. (b)), a baseball bat, in the commission of counts 15 and 16 and personally inflicted great bodily injury (§ 12022.7, subd. (a)) as to those two counts. (5CT 1336-1350.)

On November 17, 1997, after a penalty phase trial, in which both the prosecution and the defense presented evidence, the jury affixed the penalty on Count 1 at death. (6CT 1450.)

The trial court denied appellant's automatic motion for reduction of sentence (§ 190.4, subd. (e)). (6CT 1506.) The trial court sentenced appellant to death for the judgment imposed as to count 1. (6CT 1498-1499.) As to count 9, the court imposed a fully consecutive indeterminate term of 25 years to life (§ 667.61, subd. (a)-(e)), plus the upper term of 10 years for the personal firearm use enhancement. (6CT 1502-1503.) As to count 15, the court sentenced appellant to a consecutive indeterminate term of life, plus one year for the deadly weapon enhancement plus three years for the great bodily injury enhancement. (6CT 1504-1505.)

The court selected count 4 as the principal determinate term and imposed the upper term of nine years for that robbery in concert plus a 10-year upper term for the section 12022.5 enhancement. (6CT 1505-1506.) The court ordered that the sentences on counts 5, 10, 12, 13, 14 and 16, run consecutive to the sentence imposed on count 4 and recalculated the sentences pursuant to section 1170.1, subdivision (a) to be one-third of the mid-term for the terms and enhancements connected to each of those counts as follows: count 5, three years four months; count 10, three years; count 12, 16 months; count 13, 16 months; count 14, 20 months; and count 16, three years four months. (6CT 1493, 1501-1505; 12RT 4299-4301.) The court struck the section 213, subdivision (a)(1)(A) allegations as to counts 12 and 13. (6CT 1503-1504.) The court imposed concurrent terms as to counts 6, 7, and 8. (6CT 1501-1502). The trial court stayed the sentences as to counts 2 and 3 pursuant to section 654. (6CT 1499.) Pursuant to section 654, the court further stayed principal armed enhancements as to counts 4 through 10 and 12 through 14. (6CT 1500-1505.)

This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

I. Guilt Phase Evidence

A. Prosecution Evidence

1. Murder Of Koen Witters On December 9, 1995 (counts 1-3)

From November 1994 through November 1995, Theresa Wheatley resided with her husband, her daughter Jessica Rodriguez, and her granddaughter in Apartment 83 of the Pheasant Ridge Apartments, located on Colima Road in Rowland Heights. (6RT 2618-2620, 2623.) The Pheasant

Ridge Apartments consisted of several hundred units in two wings. (5RT 2326.) The complex was not gated, and the security guard building was not occupied during the day. (7RT 2891.)

Ms. Wheatley's husband was appellant's uncle. (6RT 2618.) Wheatley's lease expired on November 30, 1995. A few days prior to November 30, appellant and two other men helped Ms. Wheatley and her family move out of the apartment. Appellant was at Wheatley's apartment for four or five hours during the move. (6RT 2620-2625.) Jessica moved in with her sister, Joanne Rodriguez. (6RT 2621.) Ms. Wheatley and her husband gave Jessica a car they owned (Peo. Exh. 6 [photo]) to drive. (6RT 2621-2622.) Wheatley believed appellant was living with Joanne at the time Wheatley moved. (6RT 2624-2625.) Jessica was dating codefendant Drebert. (6RT 2622-2623.)

In September 1995, Koen Witters, a Belgian citizen, came to the United States to perform work for Free-Free, a company headquartered in Taiwan. Witters moved into Apartment 401[5/] of the Pheasant Ridge Apartments. (5RT 2334-2337; 7RT 2884-2891.) Apartment 401 was a ground-floor unit of the complex and was not directly accessible from the carport area. (5RT 2328-2329.) Sherie Chen, another Free-Free employee, lived in a different apartment in the same complex. (5RT 2337.) In October 1995, Ms. Chen and Witters's friend, Chris Cheuk, were introduced to Witters's girlfriend, Jasmine, who lived in Taiwan. (5RT 2346-2348; Peo. Exh. 25H [photo].)

On December 9, 1995, Witters dropped off his rental car, and Ms. Chen drove him to the apartment complex around 4:00 p.m. Ms. Chen arranged to meet Witters at 9:30 p.m. to retrieve the apartment keys and a company cellular phone before he returned to Taiwan later that evening. (5RT 2337-

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5. Wheatley's apartment, Apartment 83, was located several hundred yards from Apartment 401. (7RT 2892-2893.)

2339.) Around 9:20 p.m., Ms. Chen went to Witters's apartment and repeatedly knocked on the door and called Witters's name. (5RT 2339-2340.) When he did not respond, she waited outside the front door. The airport shuttle driver arrived and knocked on the door but received no response. The driver then tried the door knob, and found the door unlocked. (5RT 2340-2342.) They entered the apartment, and Ms. Chen noticed the living room was in disarray. The driver looked into the bedroom, turned around, and said "He's dead. He's dead." He grabbed Ms. Chen and pulled her out of the apartment. (5RT 2342-2343.) The shuttle driver and Ms. Chen drove to the security office and called 911. They returned to Witters's apartment with a security guard and waited for the police to arrive. (5RT 2343-2344.)

Los Angeles County Deputy Sheriffs arrived around 10:00 p.m. Paramedics arrived seconds later, checked Witters for vital signs, and pronounced him deceased. (5RT 2326, 2329-2332.) When investigating officers Los Angeles County Deputy Sheriff Stephen Davis and Sergeant John Laurie arrived, they found Witters lying face down in the bedroom. (5RT 2359-2360, 2367-2368; 7RT 2885.) His ankles and hands were bound with white socks and videotape. His mouth was gagged with a white athletic sock secured in place by a plastic bag wrapped around his head and tied with a black nylon luggage strap around his neck. (5RT 2368, 2382; 7RT 2812-2820.) The strap found around Witters's neck matched a small, square flight bag lying on the living room floor. (5RT 2375.) Lacerations were present on both of Witters's wrists. (5RT 2370, 2389-2390.) The officers found a steak knife partially imbedded in the box spring beneath the mattress. (5RT 2372.) A small amount of a substance consistent with blood was visible on the knife blade. (5RT 2385-2386.) No fingerprints were found on the knife. (5RT 2411.)

Toiletry items were present around the bathroom sink. Shaving cream and stubble were in the sink. When the bathroom door was open, the interior of the bathroom was visible from the bedroom window of Witters's apartment. (5RT 2372-2373.)

The apartment appeared to have been ransacked. (5RT 2409.) A large black suitcase on the bed had been forcibly opened and its contents strewn on and around the bed. (5RT 2370-2371, 2382-2383.) Witters's identification card, a wallet-sized photograph of an Asian woman, and other identification cards were on the floor near the bed. (5RT 2371-2372.) Witters's Apple Macintosh desktop computer was missing from the living room. (5RT 2344-2345, 2351-2354, 2357-2358, 2373-2376, 2381.) A VCR was also missing from the living room. The cellular phone issued to Witters by Free-Free was also missing. (5RT 2344-2345, 2376.)

Eugene Carpenter, a pathologist licensed to practice medicine in California and a Medical Examiner employed by the Los Angeles County Department of the Coroner, opined that the cause of Witters's death was asphyxia due to strangulation resulting from constriction of the throat and neck. (7RT 2825, 2833.) Pallor to the skin of the neck, multiple areas of bleeding in the muscles at the front of the neck and in the throat, linear purple bruising at the back of the neck, and distinctive red-brown bruises found beneath the ligature were consistent with, and specific to, this cause of death. The bruising suggested considerable force was applied by the ligature or the ligature combined with another force. (7RT 2831-2835.) The bruising on the back of the neck and large abrasions scattered over the central area of Witters's face were consistent with a downward force being applied on the neck, forcing the face hard into the carpet. (7RT 2830-2831, 2836-2839.) Two large cuts on Witters's lower forearms transected one edge of the arm to the other, exposing the tendons. The lacerations did not cut through the

tendons or major blood vessels. These wounds were bloody, consistent with circulation in the body at the time the cuts were made. (7RT 2831-2832.)

2. Crimes Against J.S. And E.G. On December 15, 1995 (counts 4-11)

a. Victims' Account Of The Crimes

On December 15, 1995, J.S. lived on Deveron Drive in Whittier with her husband, E.G. (7RT 2895-2896; 8RT 3000.) Around 9:30 p.m. that evening, J.S. and E.G. returned from the home of E.G.'s parents. (7RT 2897-2898; 8RT 3000-3001.) E.G. pulled the car onto the driveway, exited the car, and manually opened the garage door because the automatic garage door opener was not working. (7RT 2898-2899.) After opening the door, E.G. returned to the car, drove into the garage, and turned off the ignition and car lights. E.G. got out of the car while J.S. collected her belongings. (7RT 2899; 8RT 3001-3002.)

E.G. turned around and saw a masked man standing next to the driver's side of the car. The mask had one large opening for the eyes and one for the mouth. The man pointed a gun directly at E.G. (8RT 3002-3003, 3022.) The man was a little taller than E.G., who was five-feet, eight-inches tall. (8RT 3003.) The man told E.G., "Give me your money." (8RT 3003.) E.G. reached into his fanny pack and removed his wallet. E.G.'s keys to the house and two cars were also in the pack. (8RT 3003-3004.) E.G. noticed three or four other men emerge from around the garage. Two or three of the men wore masks, similar to ski masks. Two wore beanies pulled down and a bandana over their mouths. At least two of the men had guns. Most of the men wore dark cloth gloves. (8RT 3005-3008.)

J.S. was still seated in the front passenger seat when she heard E.G. yell. (7RT 2899.) J.S. looked toward her husband, who was still inside the

garage, and saw two men facing him. One had his hand outstretched at shoulder height and appeared to hold something. (7RT 2900-2901.) J.S. believed her husband was being robbed, took out her wallet, and removed $100. Before she was able to get out of the car, one of the men walked around to her door, held a gun inside the passenger door, and pointed it at her chest. The man did not say anything to her. She gave him the $100. (7RT 2901-2902.) The man motioned with his gun for J.S. to get out of the car. J.S. was frightened and complied. When she got out of the car, J.S. saw her husband standing on the driveway in front of a brick wall. (7RT 2903.)

The man who had confronted E.G. told E.G. not to look at his face and to follow him out to the driveway. The man asked E.G. if he had any money in the house. (7RT 2903-2904; 8RT 3004.) E.G. said he had some money inside. He led the way. (8RT 3006-3007.)

Everyone entered the kitchen. The group then walked down a hallway to the master bedroom. (7RT 2905-2907.) As they exited the kitchen, J.S. looked up and made eye contact with the man following her husband. (7RT 2909-2910.) The man – whom J.S. later identified as Pritchard – appeared to be Latino and had distinctive eyes. His eyes reminded J.S. of a Spanish phrase, "Ojos Chinos," meaning "Chinese eyes." (7RT 2910-2911.)[6/] Pritchard said, "Stop looking at me, or I'm gonna kill you." (7RT 2910.) Pritchard held a gun. (7RT 2913.) He had a dark bandana covering his mouth and wore a dark beanie on his head pulled down to his eyebrows. She could

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6. On March 4, 1996, J.S. attended a lineup at the County Jail and viewed three lineups of six men each. In one lineup, she recognized the man with "Chinese eyes" as being the person in position number 1 of People's Exhibit 39. (7RT 2913-2914, 2921.) This was the man who told J.S. to stop looking at her and held a gun. (7RT 2914-2915.) The parties stipulated that the man in position 1 in People's Exhibit 39 was Eric Pritchard. (7RT 2915.)

see part of his nose and his eyes. (7RT 2911-2912.) J.S. noticed that Pritchard was very tall, around six feet tall. (7RT 2907-2908.)

They entered the master bedroom. Pritchard told J.S. and E.G. to sit on the bed, and they complied. (7RT 2908-2909.) J.S. saw two additional men in her house who were close to six feet tall. (7RT 2916-2917.) One of these men -- whom J.S. later identified as Jason Vera[7/] -- had an olive complexion, very deep set "sad" eyes, and a large hooked nose. He wore a bandana over his mouth and a beanie on his head. He had a "regular build." (7RT 2917-2918.) The other man in the doorway had a very light complexion and wore a bandana over his mouth and a beanie on his head. (7RT 2918.) He was very thin and tall and could have been either Caucasian or Hispanic. Both the thin, light-skinned man and Vera held guns which they pointed toward J.S. and E.G. (7RT 2919-2920.)

The men rummaged through the dresser and the closet. They told J.S. and E.G. to lie down on the bed. (7RT 2916; 8RT 3008-3010.) The men used E.G's belts and ties to bind J.S.'s and E.G.'s hands behind their backs and to tie their legs together at the knees and ankles. (7RT 2922-2923; 8RT 3009.) J.S. was lying face down on the bed next to her husband. (7RT 2923.) The men searched the house. (8RT 3010.)

One of the men sat next to J.S. on the bed and asked her if they had children, if they were expecting anyone, if they had firearms, and questions about their neighbors. He also asked if they were going to call the police after they were gone. J.S. said, "No." The man said that, if she did, they would send their "homeboys" to kill their family. (7RT 2925; 8RT 3011.) This man was not Pritchard (the man who had threatened to kill her in the hallway).

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7. At the March 4 lineup, J.S. recognized as the man depicted in position 6 of People's Exhibit 40 as the man with the olive-complexion. (7RT 2920-2921.) The parties stipulated the man in position 6 of People's Exhibit 40 was Jason Vera. (7RT 2921.)

(7RT 2926.) At least two of the men, including Pritchard, put guns to the heads of J.S. and E.G. and repeatedly asked, "Where is the money? Is it worth your life?" (7RT 2926-2927.) While being threatened, J.S. heard doors and boxes being opened in the house. (7RT 2927.)

At some point, one of the men began "flipping out" and repeatedly said, "You saw my insignia." The man asked E.G. if he knew the gang to which the sign belonged. E.G. denied seeing the mark. (7RT 2928-2929; 8RT 3013-3014.) The man removed a bullet from his gun, put it on the bed between J.S. and E.G., and asked, "Isn't it big?" (7RT 2929; 8RT 3013.) At another point, one of the men put the gun against the lens of E.G.'s eyeglasses. (8RT 3013.) Several of the men, including Pritchard, taunted J.S. and E.G. and inquired whether they would perform sexual acts to save their lives. (7RT 2929-2930; 8RT 3014.)

After initially failing to locate them himself, the robber who appeared to be the leader of the group took J.S. from the room to locate some hypodermic needles. (7RT 2931-2934, 2952; 8RT 3015-3016.) This man was over six-feet tall, had a "good build," and wore a mask over his face that had holes for his eyes and mouth. (7RT 2936.) J.S. walked down the hall into the other bedroom and showed him the bag containing the needles. The man said, "Never mind, we're gonna go into the bathroom." J.S. began to cry. (7RT 2934-2935.)

Once inside the bathroom, and while J.S.'s hands remained tied behind her back, the man lifted her sweater and fondled her breasts. (7RT 2935-2937, 2943.) He pulled down her pants and made comments about her pelvic area and vagina. (7RT 2937-2938.) The man removed his penis from his pants and said, "Bite it, and I'll kill you." He forced J.S. to orally copulate him for a few minutes, raped her, again forced her to orally copulate him, and

raped her a second time. He ejaculated inside her vagina. He had J.S. stand, then pulled up her pants and buttoned them. (7RT 2939-2942.)

The man walked J.S. into the second bedroom, laid her face down on the bed and left. (7RT 2943.) Pritchard immediately entered the bedroom. (7RT 2944-2945.) He told her to kneel on the floor and said, "Bite it and I'll kill you." Pritchard forced J.S. to orally copulate him, and he ejaculated into her mouth. (7RT 2945-2947.) He laid her down on the bed face down. She was crying loudly. Pritchard asked her why she was crying. When she told him she was crying because the other man had raped her, he became very angry. He told her not to make so much noise or he would kill her. (7RT 2947-2948.)

Pritchard left. Another man entered and stood guard. He repeatedly cocked and uncocked his gun and talked to J.S. (7RT 2948.) This man asked J.S. what she did for a living and how much money she made. J.S. answered because she was trying to save her life. The man who raped her entered and left the bedroom three times during this conversation. Once when he entered the room, he lay on top of her, made thrusting movements with his pelvis, and taunted her, saying "Oh, it was good, wasn't it? It was big, wasn't it?" (7RT 2949.)

The robbers tied J.S. with additional belts and ties. (7RT 2952-2953.) The man who raped her pulled down her pants and fondled her buttocks. Several of the other men also fondled her buttocks. (7RT 2950-2951.) The man who raped J.S. also made sexual comments about E.G. (7RT 2951.) Someone put a handkerchief in J.S.'s mouth and tied another handkerchief around her neck to secure it, but J.S. could still speak. She told the man who raped her that she could not breathe, and he removed the gag. J.S. was still face down on the bed. (7RT 2953-2954.) The man who raped her asked her about her background. When she replied that she was Mexican, he said,

"Really?" He asked her if she could speak Spanish and then asked her, in Spanish, how old she was. After she replied in Spanish, the man asked her why she married a "white guy." (7RT 2955-2956.) She told him that her husband was Puerto Rican. The rapist immediately left the room. He returned later and said he would not kill her because she was Mexican. He told her not to move for 20 minutes after they left. (7RT 2956-2957.)

While J.S. was gone from the room, E.G. remained tied up on the bed. One of the robbers engaged him in conversation about his job, whether E.G. was going to have a family, and why he did not keep weapons in the house. E.G. heard J.S. crying. (8RT 3016-3017.) One of the robbers asked E.G., in Spanish, his age. E.G. answered in English. The man left. Another man entered the room and said, "You don't look like a Puerto Rican." (8RT 3017.) E.G. was gagged with a handkerchief held in place with a t-shirt tied around his head. One of the robbers instructed him not to call the police for 20 minutes. The men left. (8RT 3018-3019.)

E.G. and J.S. freed themselves. J.S. tried to call the police, but the phone cords in the house had been cut. J.S. found an extra cord, her husband connected it, and J.S. called 911. (7RT 2958-2961; 8RT 3019-3020.)

J.S. and E.G. saw their home was ransacked. Stereo equipment, a VCR, two telephone answering machines, pocket watches, J.S.'s laptop computer, food, clothing, a guitar and guitar case, a toaster, an iron, and lot of jewelry was missing. (7RT 2962-2963; 8RT 2969-2970, 3020.) The laptop computer was a dark gray, Sceptre brand computer with a liquid crystal display. The screen was soft; it flexed and changed color when touched. (7RT 2963-2964.) In addition to the $100 J.S. gave the man in the garage, $100 was taken from a dresser in the house and E.G. gave the men $100 from his pocket. (8RT 2968-2969.) Two answering machines were taken. A service receipt (IV Supp 2CT 382 [Peo. Exh. 41]) documented the repair of

one machine. (7RT 2964; 8RT 2970-2971.) A 1989 Honda Accord registered to J.S. was taken from its location inside the garage. (7RT 2963; 8RT 3021, 3030.)

After the police arrived, J.S. was taken to Whittier Presbyterian Hospital where a sexual assault examination was conducted. (8RT 2972-2973, 2955-2999.) A police officer interviewed E.G. at their residence and J.S. at the hospital and wrote a report. (8RT 2990.)

J.S. believed the man who raped her was Hispanic based upon his voice. (8RT 2966-2967.) Of the four robbers, J.S. described the man who raped her as the tallest man. (7RT 2961.) The shortest man was Pritchard. (7RT 2961-2962.) J.S. estimated that the light-complected man was close to Pritchard's height, which she estimated to be six feet. (7RT 2962.)[8/] All four men wore dark, knit gloves. (8RT 2967.)

Two or three days after the robbery, J.S. found the keys from E.G.'s fanny pack on top of the refrigerator. The key to the Honda was missing. (8RT 2967-2968.) The Honda was recovered by police on December 27, 1995, at 12702 Salisbury Street in Baldwin Park. (8RT 3028-3030.) Cassette tapes and CDs were missing from the Honda. (8RT 2969-2970.)

b. Victims' Post-offense Identifications And Statement

On March 4, 1996, Los Angeles County Deputy Sheriff David Vasquez conducted three lineups at the Central Jail: one containing Pritchard, another

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8. A booking report prepared when appellant, Pritchard, Vera and Drebert were arrested on January 19, 1996, listed Pritchard's height and weight as five feet, nine inches tall and 135 pounds. Appellant was listed as six feet, four inches tall, 210 pounds. Drebert was described as six feet tall, 150 pounds, with a thin build. Vera was described as six feet, two inches tall, 170 pounds, with a medium build. (5RT 2264-2265; see also 8RT 3148-3150.) Appellant was the tallest and heaviest man of the four and had a "muscular" build. (8RT 3150-3151.)

containing Vera, and another containing Drebert. (8RT 3041, 3043-3044.) J.S. viewed the three lineups and identified Pritchard from one lineup and Vera from another lineup. (8RT 2974-2975.) She tentatively identified a person from the third lineup. (8RT 2975-2976.)

J.S. viewed another lineup on March 20 at the County Jail. (8RT 2977.) Although appellant was in the lineup, J.S. tentatively identified two other persons as similar in build and voice to the rapist. (8RT 2979-2980, 2987-2988.)

After the lineups on March 4, J.S. and E.G. began preparing a document summarizing their recollections about the incident. They completed the document after the March 20 lineup. They inserted the people they thought they had identified at the lineups into the summary and submitted it to the police department. (8RT 2987, 2990-2991.) The narrative included J.S.'s physical description of the rapist. (8RT 2992.)

c. Appellant's Refusal To Participate In A Court-Ordered Lineup

A lineup including appellant was scheduled for March 4, 1996. (8RT 3043-3044.) After the lineup was prepared and photographed, appellant refused to stand in the lineup. (8RT 3044-3045, 3048-3049.) Appellant was advised of the charges that were the subject of the lineup as listed the lineup refusal form. Appellant signed a Sheriff's Department refusal form on which he stated that he did not commit the crime and did not want to be a part of the lineup. (8RT 3045-3046; IV Supp 2CT 383 [Peo. Exh. 47 (form)].)

d. Appellant's Conduct In Response To Court-ordered Blood Samples

On July 20, 1996, Sergeant Joseph Purcell of the Los Angeles County Sheriff's Department obtained a court order commanding appellant to provide a blood sample. (8RT 3032.) On July 11, 1996, Sergeant Purcell met with appellant at the Los Angeles County Men's Central Jail near the clinic office. Purcell informed appellant that he had an order to get blood, saliva and hair samples from him. (8RT 3033.) Purcell informed appellant that the purpose of the samples was to perform DNA testing. (8RT 3034.) Purcell showed the court order to appellant. (8RT 3036-3038.) Appellant responded that he did not have to obey court orders. (8RT 3038.) Appellant told Purcell that he would not provide the samples, just as he had not participated in the lineup ordered by the court. Purcell told appellant that he did not have a choice. Appellant responded, "Fuck you." (8RT 3034.) Purcell asked his partner, Deputy Hearne, to telephone the Pomona judge who had signed the order and advise the judge of the situation. The judge directed Hearne to amend the court order with a written statement that "all reasonable force" be used to complete the order. (8RT 3034-3035.) The watch commander, Sergeant Frank Gomez, listened to the call with the judge as the amendment was directed and approved by the court. (8RT 3035.)

Several deputy sheriffs responded to the clinic and a blood sample was drawn from appellant. (8RT 3035, 3039-3040.) Appellant's handcuffs and waist chains were not removed while the blood was drawn. (8RT 3039.) Purcell drove the blood sample to the Los Angeles County Sheriff's crime lab and booked it as evidence in the serology section. (8RT 3035.)

e. DNA Testing Was Consistent With Appellant

The parties stipulated that, around 3:00 a.m. on December 16, 1995, at Whittier Presbyterian Hospital, Dr. Roger Woodard performed a sexual assault examination of victim J.S. and obtained vaginal and oral swabs. (6RT 2703, 2705.)

In September 1996, Cellmark Diagnostics, a private laboratory that conducts DNA[9/] testing primarily for human identification (6RT 2706-2708), received blood samples identified as originating from J.S., appellant, Michael Drebert, Eric Pritchard, and Anthony Vera. (6RT 2703-2705, 2729-2730) and oral and vaginal swabs identified as being taken from an examination of J.S. (6RT 2703-2705, 2730).

Restriction fragment length polymorphism (RFLP) testing attempted on the vaginal swab was inconclusive. Only DNA from J.S. was obtained using the RFLP test. (6RT 2715; 7RT 2737-2738.) For RFLP testing to get a DNA profile, close to 250,000 sperm cells are needed. (7RT 2739.) The inconclusive finding was the result of the quantity of sperm present in the sample. (7RT 2793-2794.)

Polymerase chain reaction (PCR) testing is similar to conventional ABO blood typing in that each site on the DNA molecule has a limited number of PCR marker types. (6RT 2716-2718.) PCR testing can be performed on extremely small biological samples and very old samples. (6RT 2719.) For PCR testing, only around 200 sperm cells are needed. (7RT

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9. DNA stands for deoxyribonucleic acid, the genetic material contained in each the nucleus of the cells in the body, except for red blood cells. (6RT 2709.) 99 percent of DNA is the same from person to person. The remaining one percent does not include genes that code for physical characteristics. This "nonsense DNA" differs from individual to individual and can be used to forensically identify or exclude sample donors. (6RT 2710, 2720.)

2739.) Several tests "map" PCR markers in the laboratory. (6RT 2720.) The DQ Alpha polymarker test examines six points on the DNA molecule in the region that differs from individual to individual. (6RT 2723.) The Short Tandem Repeats (STR) test examines three different sites on the molecule plus gender. (6RT 2723-2724.) Together, the DQ Alpha and STR tests provide nine pieces of genetic information plus gender. (6RT 2724.) For PCR testing, swab specimens are separated into "sperm" and "nonsperm" fractions using chemicals and centrifugal force. (7RT 2744-2747.) Some cells from the victim remain in the sperm fraction. (7RT 2748.) It is common for separation in the fractions to be incomplete. (7RT 2749.)

Cellmark performed DQ Alpha polymarker tests upon the five blood samples and the oral and vaginal swabs in November 1996. (6RT 2730-2731.) Based upon Cellmark's testing, J.S. could not be excluded as the donor of both the sperm and nonsperm fractions from the oral swab. (7RT 2749-2750.) Appellant, Drebert, Pritchard, and Vera were all excluded as donors of the DNA obtained from the oral swab because all four possessed types at one or more of the six locations that are not present in the oral swab. (7RT 2750.) The length of time that elapses between an assault and swabs being taken tends to decrease the likelihood of sperm being present in the mouth. Swallowing or rinsing would reduce the presence of sperm. (7RT 2751-2752.)

The vaginal swab taken from J.S. was divided into sperm and nonsperm fractions. (7RT 2752-2753.) DQ Alpha testing detected DNA from more than one person on the vaginal swab. (7RT 2756.) The data was consistent with the sperm fraction being a mixture of genetic material from two people. (7RT 2765.) Based upon Cellmark's testing, Drebert, Pritchard and Vera were conclusively excluded as donors of the sperm fraction. (7RT

2754, 2756-2760, 2762-2763.)[10/] Because appellant's DNA was consistent with all six genetic markers examined, he could not be excluded as a donor of the sperm fraction. (7RT 2764.) The results were consistent with J.S. and appellant being the donors of the DNA in the sample. (7RT 2766; see also 7RT 2757-2764.)

In April 1997, STR tests were performed on a blood sample submitted for appellant and J.S.'s vaginal swab and blood sample. (6RT 2704-2705; 7RT 2766-2767.) The results of the STR testing supported a finding that DNA was present from at least two individuals in the sperm fraction. (7RT 2768-2771, 2773.) Cellmark tested for three markers (CSFIPO, TPOX, and THO1) and gender (XY). (7RT 2771.) The findings for all three genetic markers were consistent with J.S. and appellant. (7RT 2772-2779.) The gender test (XY) showed male DNA. (7RT 2779-2780.)

Thus, across the nine genetic markers tested, appellant could not be excluded as a donor source for the DNA on the vaginal swab that did not originate from J.S. (7RT 2780-2782.) Cellmark's forensic DNA expert concluded, based upon the PCR testing, that appellant's blood sample was consistent with the sperm from the vaginal swab from J.S. (7RT 2785.) Appellant's combination of STR markers occurs 1 in 1300 in the Caucasian population and 1 in 2700 in the Hispanic population. (7RT 2801-2802, 2806.) Cellmark's forensic DNA expert did not calculate the statistical frequency for a combination of the STR and DQ Alpha markers but opined such a calculation would result in a significant increase in the numbers provided. (7RT 2807, 2811.)

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10. A chart summarizing the results of the DQ polymarker testing was presented to the jury. (7RT 2741-2744; Peo. Exh. 32 [chart].)

3. Robbery Of Ruth And Patrick Weir On December 23, 1995 (Counts 12-14)

On December 23, 1995, Ruth Weir resided in West Covina with her husband, Patrick. Their residence had a detached garage. (8RT 3052, 3054.) The cross street was Swanee Street, which dead ends at Conlon near the Weir residence. (8RT 3052-3053.) An elementary school is located six houses north of the Weir residence. (8RT 3053.)

Around 5:00 p.m. that evening, Mrs. Weir returned to her home in her 1993 white Ford Taurus after running errands. (8RT 3056-3057.) Ms. Weir opened the garage door with the remote opener and drove into the garage. (8RT 3057.) Mr. Weir was out in his car. Mrs. Weir removed groceries from the trunk and took them inside the house. Mrs. Weir exited her back door and walked across the back patio toward the open side door of the garage. (8RT 3058-3060.) Two men wearing dark-colored ski-type masks entered the yard through the garage. (8RT 3060-3061.) One of the men held a gun. Using the gun, the man gestured toward the house and said, "Go inside." The man also pointed the gun at Mrs. Weir's dog, which was outside with her. (8RT 3062-3063.) In response to questions, Mrs. Weir told the men that no one was inside the house, she expected her husband home, and she did not know about the neighbors. Once inside the house, one of the men closed the curtains in the living room. Mrs. Weir entered the back room of her home, the family room, followed by the two men. (8RT 3063-3065.)

While they were in the family room, Mrs. Weir heard her husband's El Camino pull into the driveway. Mrs. Weir looked outside and saw a man standing near the gate at the end of the block wall in the backyard. (8RT 3066.) At the direction of one of the men, Mrs. Weir entered the dining room at the front of the house and lay on the floor. (8RT 3067, 3070.) The man

pulled down the shades in the dining room. Mrs. Weir did as the man said because she was scared. (8RT 3068.)

Mrs. Weir heard her husband enter the house through the family room. (8RT 3069.) Mr. Weir was a stroke victim and suffered from expressive aphasia, which caused him to not always understand words spoken to him. The man in the dining room had Mrs. Weir get up and enter the family room. (8RT 3070.) Mr. Weir was lying face down on the floor. At that point, there were three robbers in the room with the Weirs. (8RT 3071.) The third man did not wear a mask; he covered his mouth and nose with the lapel of his jacket. (8RT 3072.) One of the masked men told Mrs. Weir to lie down next to her husband. (8RT 3073.)

Of the three robbers, one appeared to be the leader. (8RT 3094.) One of the robbers brought a knife from the kitchen and gave it to another robber who sat on the couch. (8RT 3073-3074.) The other robbers proceeded to bring wrapped Christmas packages from a spare bedroom into the family room. (8RT 3074-3076.) Mrs. Weir heard two robbers going through her handbag in the kitchen. (8RT 3076-3078.) One of the men asked her if she had money. When she answered, "No," he responded, "If I find any money in your wallet, you're dead." The man also asked Mrs. Weir the location of her gun. (8RT 3078.) When she told the man that she did not have a gun, he said, "Yes, you have this police thing in your wallet." (8RT 3079.) The item inside the wallet was a police badge that identified her as a volunteer with the "SHOP" program, Seniors Helping Our Police. Mrs. Weir performed volunteer work for the West Covina Police Department, and she received training to assist in emergency situations. (8RT 3079-3080.) One of the robbers came out of the kitchen and put his hands inside Mrs. Weir's pants pockets and in the pocket of her husband's pants. (8RT 3077, 3081.) One

man asked for her car keys, which were on a hook in the cupboard. (8RT 3081-3082.)

The robbers took the packages out of the house. (8RT 3082.) Mrs. Weir lifted her head and said, "You're taking my Christmas presents. Why are you taking my Christmas presents?" One man leaned over, put the gun to her head and said, "If you pick your head up again, I'll put a bullet in it." He also said, "Would you rather have your Christmas presents or your life?" Mrs. Weir did not look up again because she was "scared to death." (8RT 3083.)

After the men left the house, Mrs. Weir got up and dialed 911. When the police arrived, Mrs. Weir inspected her house. Jewelry was missing from her bedroom, including five diamond rings, diamond earrings, and some gold chains. (8RT 3084-3085.) The wrapped Christmas presents were missing from the spare bedroom. $80 had been taken from Mr. Weir's wallet and $4 from Mrs. Weir's wallet. A gasoline credit card and her SHOP badge were also missing from her wallet. (8RT 3085.) Mrs. Weir had made two sets of three ceramic angels and wrapped them as gifts. Both sets were missing. (8RT 3085-3086, 3092.) Mrs. Weir's Ford Taurus was also missing from her garage. (8RT 3086-3087.) A Ziplock sandwich bag containing commemorative coins was also missing. (8RT 3088-3089.)

Angela Phillipson, a neighbor of the Weirs, was outside just before dark on December 23, 1995. She saw an older, two-tone beige, four-door, American model car (similar to the two-tone car Wheatley gave to Jessica Rodriguez) and Mrs. Weir's white Ford Taurus parked on the north side of Swanee. (8RT 3096-3100, 3104-3106.) The Taurus backed up and drove away very fast southbound on Conlon. (8RT 3101-3102.) The other car drove away at normal speed in a westbound direction on Swanee. As the car drove past Phillipson, she saw a driver and a front passenger inside the car. (8RT 3102.) Later Ms. Phillipson noticed several police vehicles around the

Weir residence. As she approached the Weir home, she noticed the same two-tone car she had seen earlier turn around in the street in front of Phillipson's home and drive back in the other direction. (8RT 3103-3104.)

Police found Ruth Weir's white Ford Taurus on the evening of December 24, 1995, in the parking lot of the Wesco Auto Parts store located at 1705 West Garvey in West Covina. The car was locked. The keys were in the ignition. The car's stereo was missing and the left front fender was damaged. The car was returned to Mrs. Weir. (8RT 3090-3091, 3109-3112.)

A neighbor who lived on Swanee gave the bag of commemorative coins to Mrs. Weir about a week after the robbery. (8RT 3089-3090.)

Mrs. Weir attended three lineups on March 4, 1996. She did not positively identify anyone from the lineups as being involved in the robbery. (8RT 3090.)

4. Drebert And Vera Possess Ski Masks And Gloves When Stopped By Police On January 6, 1996

On January 6, 1996, around 2:27 p.m., City of Montebello Police Officer Ron Santo stopped a beige Buick with a dark beige or brown top, bearing license plate number 2WKN135. (8RT 3115-3116.) Officer Santo identified People's Exhibit 6 as depicting the car he stopped on January 6, 1996. (8RT 3116.) Jessica Rodriguez, Drebert, and Vera were inside the vehicle. Jessica was the driver. (8RT 3116-3118.)

After stopping the car, Officer Santo impounded it and had it towed to a police impound yard. Prior to having the car towed, Officer Santo inspected the passenger compartment. He found a pair of cotton gloves and a ski mask under the front passenger seat. (8RT 3118-3119.) Two ski masks were on the back seat of the car. These items were booked as evidence. (8RT 3119-3125.)

On January 8, 1996, three black knit gloves were collected from the front floorboard of the Buick and booked into evidence. (8RT 3128-3133.)

5. Attempted Murder Of Michael Martinez On January 19, 1996 (Counts 15 and 16)

a. Michael Martinez's Association With Amy Benson, And Thereby Appellant

The Lido Garden Apartments consisted of two parallel two-story buildings separated by a parking area located between Harbert Street and Dennis Street in West Covina. (4RT 2078-2079.) Michael Martinez resided in Apartment 15 of the Lido Garden Apartments. Amy Benson, the pregnant daughter of a family friend, began staying in his apartment around October 1995. Martinez believed that the father of the child was Martinez's prior roommate, who had moved to Washington. Martinez did not have a romantic relationship with Amy Benson. (4RT 2158-2160, 2165.) Amy Benson was also called "Gabby." (8RT 3136.)

In November and December 1995, appellant, Drebert, Pritchard and Vera were staying with Joanna and Jessica Rodriguez in an apartment on the Harbert side of the apartment complex. (4RT 2162-2164.) When Martinez saw appellant around the apartment complex, he was ordinarily with Pritchard, Drebert, and Vera. (4RT 2164.) Martinez heard Drebert, Pritchard, and Vera call appellant, "Dad." (4RT 2165.) Martinez had never gone to the apartment of Joanna and Jessica Rodriguez to drink with appellant. (5RT 2240.) Amy Benson sometimes babysat 12-year-old Justine at Martinez's apartment. (5RT 2241.)

In January 1996, Amy Benson hung around the complex with appellant, Pritchard, Drebert and Vera on a near daily basis. (4RT 2165.) Amy's association with the men created problems because the owner

threatened to evict Martinez if Amy continued to associate with them. (4RT 2166.) In December, Martinez told Amy that appellant, Pritchard, Drebert and Vera were no longer allowed inside his apartment because Martinez and Amy would be evicted. The men continued to visit the apartment. (4RT 2166-2168.) In early January 1996, Martinez told appellant that he did not want appellant hanging around his apartment. (4RT 2167.) The men did not come over for a few days, but then the visits resumed. (4RT 2168-2169.) Martinez did not trust appellant and feared him because appellant looked like a gang member. (4RT 2169.)

The car depicted in People's Exhibit No. 6 was driven by Joanna Rodriguez in January 1996. Martinez had seen appellant driving that car. He had also seen appellant in the car with Pritchard, Vera and Drebert on many occasions. He saw Drebert driving the car on 10 occasions with Jessica or Joanna Rodriguez. Martinez did not see Vera or Pritchard drive the car. (4RT 2216-2218.)

b. Detention Of Pritchard On January 16, 1996

On January 13, 1996, West Covina Police Officer Laurie Pruitt, who was investigating a report of a suspicious person loitering, detained 14-year-old Eric Pritchard outside the Lido Apartments. (4RT 2146-2148, 2151; IV Supp 2CT 350-352 [Peo. Exh. 4 (photograph)].) Michael Martinez saw the detention occur. (4RT 2170-2171.) Officer Pruitt took Pritchard to the police station because he was reported as a runaway. At the station, she discovered that he had a warrant for a traffic violation. Officer Pruitt contacted the authorities responsible for the warrant and was instructed to issue a citation and a promise to appear. (4RT 2149, 2152.) Officer Pruitt completed a booking report recording the address information Pritchard provided, 3241 Frazier Street, Number 6 in Baldwin Park. (4RT 2149-2151.) When

Pritchard's mother, Lisa Lucero, picked him up from the station, she provided the same address information. (4RT 2151-2152.) Officer Pruitt recorded Pritchard's height as five-feet, nine inches and his weight as 150 pounds. (4RT 2152.)

c. Martinez Is Ambushed By Appellant, Pritchard, Drebert And Vera In His Apartment On January 19, 1996

During the week prior to January 19, 1996, Martinez saw appellant, Drebert, Vera, and Pritchard in his apartment nearly every day. Each time he saw them in his apartment, Martinez told them that he was going to be evicted and that they were not allowed on the property. (4RT 2172-2173.)

On January 19, 1996, Martinez arrived at his apartment around 6:30 p.m. Amy Benson was in the living room. Martinez ate and went downstairs. When he returned to the apartment, Amy was gone. Martinez did not lock his front door so that Amy could enter. (4RT 2173-2174.) Martinez got in the shower around 8:00 p.m. and dressed in the bathroom with the door closed. At that time, the curtains on the windows facing Dennis Place were open. (4RT 2174.)

When Martinez exited the bathroom, appellant, Pritchard, Vera, and Drebert were inside the apartment. (4RT 2175-2176.) None of the men had Martinez's permission to be inside his apartment. (4RT 2179.) Appellant stood in the center of the apartment. Pritchard sat on the floor. Drebert stood near the front door and rummaged through the long closet that ran the length of the apartment wall. Vera stood near the living room window and rummaged through Martinez's desk and the closet. The curtains were closed. (4RT 2176-2178.) Appellant told Martinez to sit on the couch. Appellant's tone was angry and aggressive. Martinez was scared and complied. (4RT 2178-2179.) Drebert locked the apartment door and looked through the peep-

hole toward the outside. (4RT 2179-2180.) Vera periodically looked out the apartment window by moving the curtain aside. (4RT 2180.)

Appellant accused Martinez of calling the police on Pritchard. Martinez denied it. Appellant repeated, "We know it was you." Martinez replied, "It wasn't me. It might be the manager." Drebert held up a set of keys that had been on Martinez's dresser and asked Martinez what key fit the ignition of Martinez's car. (4RT 2181-2182.) Martinez noticed that his keys, his pager, some change, and a watch were missing from his dresser. Martinez told Drebert the information he wanted. (4RT 2182.) Appellant then struck Martinez very hard in the jaw with his fist. The force of the blow tore Martinez's lower lip and knocked Martinez backward. (4RT 2183.) Appellant asked Martinez how much money he had in the apartment. Martinez responded that he had a few hundred dollars. Appellant said he would kill Martinez if he found money exceeding that amount in the apartment. (4RT 2183-2184.)

Appellant again stated that he knew Martinez had called the police on Pritchard. Martinez again denied he had called the police. (4RT 2185-2186.) Appellant said that Pritchard wanted to kill Martinez. Pritchard lifted his shirt and revealed the butt of a gun. (4RT 2186-2187.) Pritchard smiled at Martinez. Vera approached Martinez, leaned toward him, and yelled at him. (4RT 2187-2188.) At appellant's direction, Drebert removed some belts from the closet and gave them to appellant. While Martinez was seated on the couch, appellant used the belts to bind Martinez's arms behind his back and to bind his legs. (4RT 2188-2190.) Drebert stood guard by the front door, and Vera continued to keep watch out the front window. (4RT 2189.) After Martinez was tied up, Pritchard got up and struck Martinez twice in the face, causing him to bleed. (4RT 2190.)

Martinez had three baseball bats in his closet. Drebert removed a wooden bat from the closet and handed it to appellant. (4RT 2192-2193.) Drebert gave a shirt or towel to appellant, who placed it over Martinez's head. (4RT 2191-2192.) Martinez could still see somewhat despite the towel. Martinez saw Vera retrieve a black aluminum bat from the closet. (4RT 2193-2195; 5RT 2236.)

Martinez felt one blow to his head. The next thing he remembered was waking up in the hospital. (4RT 2195-2196.) No gag was placed in his mouth while he was conscious. (4RT 2224.)

d. Discovery Of A Gravely Injured Martinez By His Neighbors

Jose Canales, one of Michael Martinez's neighbors, had seen appellant around the Lido Apartments on nearly a daily basis prior to January 19, 1996. Appellant was staying with someone who lived on the Harbert Street side of the complex. (4RT 2109, 2125.) Appellant associated with Amy Benson, who lived in the complex. (4RT 2125.) Canales often observed appellant in the company of three young men: Pritchard, codefendant Drebert, and Vera. (4RT 2126-2129.) Canales had seen appellant riding in the car depicted in People's Exhibit No. 6 with the woman who lived in the complex. (4RT 2137-2139.) He had also seen Pritchard and Vera in the car on several other occasions. (4RT 2139-2141, 2144.)

As he returned to the complex around 8:00 p.m. on January 19, 1996, Canales saw Martinez's white Ford Thunderbird parked in the cul-de-sac behind the apartments. Canales also saw Amy Benson outside the area of Martinez's apartment with a hand-held phone. (4RT 2110-2112, 2130-2131, 2133-2134.) After going for a walk, Canales saw a neighbor and the manager's daughter running back and forth at the street level; they appeared

upset and agitated and said to call 911 because Martinez was dead. (4RT 2112-2114.) Canales told them that Martinez could not be dead because he had just seen his car. Canales walked around the building and saw that Martinez's car was gone. (4RT 2115.)

Canales went to Martinez's apartment; the front door was locked. Canales used the manager's keys to open the door. (4RT 2114-2116.) Canales could not see anything at first because the apartment was "pitch dark." No lights were on inside the apartment and the curtains were closed. He then saw Martinez lying on the carpet and saw a wet spot around his head, which he immediately believed to be blood. He shouted to the girls to call 911. (4RT 2116.) Canales switched on the light and saw Martinez's elbows were tied behind his back with a belt and his legs were tied with three belts–one around his thighs, one around his knees and a third around his ankles. (4RT 2117-2118.) Martinez's face looked deformed. A wadded bandanna was stuffed in his mouth and held in place with a piece of rag tied tightly around his head. (4RT 2118, 2123.)

Canales cut the belts off Martinez with knives taken from the kitchen. He cut the rag off Martinez's mouth and removed the bandanna. Several teeth came out with the bandanna. (4RT 2119.) Canales believed Martinez might be choking on more teeth or blood, so he turned Martinez's head to the side. He also removed the belts from Martinez's legs. (4RT 2120.) He moved Martinez's arms out from his body to aid the circulation. (4RT 2122.) Canales noticed a cut to Martinez's neck. (4RT 2123; Peo. Exh. 1-B [photo of wound].)

e. Police And Medical Response

West Covina Police Officer Dario Aldecoa responded to Apartment 15 of the Lido Apartments around 8:05 p.m. (4RT 2081-2082, 2100.) As he

approached the apartment, he heard people yelling and saw a group of tenants standing in the open doorway of Apartment 15. Approximately five people were inside the apartment, right inside the doorway. (4RT 2084.)

Officer Aldecoa saw Michael Martinez lying face up in the living room in a pool of blood. Jose Canales was kneeling next to Martinez and was applying pressure to a four-inch laceration on Martinez's neck. Martinez had numerous bumps on his face, his eyes were swollen shut, and teeth had been knocked out of his mouth and were lying next to him on the carpet. (4RT 2085-2086, 2902-2093.) A wooden baseball bat was leaning against the couch. (4RT 2087, 2120.) The top eight to ten inches of the barrel portion of the bat was covered in blood. (5RT 2290.) Martinez's injuries appeared consistent with having been inflicted by a bat. (4RT 2087.)

Martinez was unconscious and gasping for air. There was blood on the carpet around Martinez's head, a blood-soaked rag lying beside him, and two or three men's belts on the carpet. (4RT 2086-2087, 2091-2092; Peo. Exh. 1A [photo depicting belts and blood stains].) Canales rendered first aid until paramedics arrived. (4RT 2087, 2103-2104.) The officers removed everyone else from the apartment. After the paramedics arrived, Canales was taken outside the apartment and interviewed. Officer Aldecoa remained inside the apartment while paramedics treated Martinez. The paramedics cut off Martinez's blue t-shirt and rolled him onto his stomach. Officer Aldecoa observed several puncture wounds to Martinez's upper back consistent with having been stabbed with a screwdriver. (4RT 2086, 2088, 2094, 2099; Peo. Exh. 1D [photo of back].) A screwdriver with blood on it was found on the couch. (4RT 2099, 2105-2107.) Almost the entire shank portion of the screwdriver had blood on it. (5RT 2288.) The paramedics transported Martinez to the hospital. (4RT 2088-2089, 2093-2094.)

A white porcelain angel (Peo. Exh. 18; 5RT 2286) was found below the television set, but it was not labeled or collected at the time. Later, it was seized and booked into evidence. (5RT 2280.)[11/]

f. Martinez Recovers And Identifies His Attackers

When Martinez awoke in the hospital, there were metal staples running up both sides of his head and from the top of his head down the back toward the neck. He was missing nine teeth and had multiple stab wounds to his back. (4RT 2198-2199.) His eyes were bruised and swollen. (4RT 2202.) He had a four- or five-inch cut on his neck that required stitches to close. (4RT 2203.) His ear drum was damaged. (4RT 2204-2205.)

Martinez spoke with Detective Ferrari and his partner after he had been hospitalized for four days. Martinez identified appellant, Drebert, Vera and Pritchard as his assailants from photographs. (4RT 2206-2210; Peo. Exh. 8 [6-pack with appellant and Jason], Peo. Exh. 9 [6-pack with Pritchard and Drebert]; 4RT 2207-2208.) On January 19, the physical appearances of Pritchard, Vera, Drebert and appellant matched that in the photographs. (4RT 2210-2211.)

Martinez was hospitalized for seven days. (4RT 2196.) Most of the stitches were removed and bruising resolved in about a month. (4RT 2205.) Martinez had 12 root canal surgeries to repair the damage to his teeth and mouth. He suffered a temporary 60 percent loss of hearing after the beating and suffered permanent damage to his sense of smell. (4RT 2200.)

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11. The ceramic angel was one of six taken from Ruth Weir's house on December 23, 1995. (8RT 3086.)

g. Recovery Of Martinez's Vehicle

On January 19, Martinez owned a 1977 white Ford Thunderbird with a brown top bearing a New Mexico license plate. (4RT 2211, 2215-2216.) When Martinez entered the shower on the evening of January 19, his car was parked on Dennis Place directly across the street from the apartment complex. (4RT 2211.) At that time, a black backpack (Peo. Exh. 14 [backpack]) was on the rear seat of Martinez's car. The backpack contained papers, bills, keys to a truck at work, a personal organizer (Peo. Exh. 15 [organizer]), and a wallet containing his driver's license, credit cards, and $300. (4RT 2211-2213; 5RT 2236-2239.) No one had permission to drive Martinez's car away from the parking place on Dennis Place. (4RT 2213.)

Around 4:45 a.m. on Sunday, January 21, 1996, West Covina Police found Martinez's 1977 white Ford Thunderbird parked in a small strip mall located at 2145 West Garvey Avenue. (5RT 2295-2296.) The vehicle was unlocked, and the keys were in the ignition. (5RT 2296.)

6. Arrest Of Appellant, Drebert, Pritchard, And Vera At Gladys Santos's Apartment On January 19, 1996

Between 6:00 and 7:00 p.m. on January 16, 1996, Olga Rodriguez, the manager of the Lido Apartments, saw appellant, Pritchard, and two "cholo type gang members" riding in a red Camaro bearing license plate number 2VPF426 in the area of Harbert Street and Dennis Place. (5RT 2244.)

Around 9:00 p.m. on January 19, 1996, West Covina Police Officer Don Preston and his partner, Officer Cirrito, responded to a radio call concerning an assault at the Lido Garden Apartments. The dispatch also indicated that persons who may have been involved in the incident were driving a red Camaro bearing license plate number 2VPF426. (5RT 2246.) As Officers Preston and Cirrito patrolled the area looking for the vehicle, other officers summoned them to a large apartment complex located at 2001

West Garvey in West Covina. Approximately a half mile separated the West Garvey apartment complex from the Lido Garden Apartments complex. (5RT 2247.)

Pritchard was detained by officers as he attempted to drive out of the complex in the red Camaro. (5RT 2247-2250.) After initially directing the officers to Apartment 15, Pritchard led Officer Preston and other officers to Apartment 38. (5RT 2250-2251, 2262-2263.) Officer Preston knocked on the door to Apartment 38, and Gladys Santos opened it. Pritchard was standing next to Officer Preston. Ms. Santos denied any knowledge of Pritchard. (5RT 2251-2252.) In response to questioning, Santos represented that the only people in her apartment were the children and two teenagers in her living room. Officer Preston asked permission to search the apartment, and Santos consented. Apartment 38 was a two-level apartment. (5RT 2252-2253.) As the officers walked toward the stairs, Officer Preston heard a door slam upstairs. The officers evacuated Santos, four children, and two teenagers from the lower level of the apartment. The officers then ordered the occupants of the second level to come downstairs. (5RT 2253.) Vera came down followed by Drebert. (5RT 2254-2255.) Then a teenage female came down. Appellant was the last person to descend. (5RT 2255.)

The officers arrested Santos for delaying an officer in the performance of his duties. (5RT 2257.) The basis for the misdemeanor charge was her denial that the suspects were present in her apartment. (5RT 2258.)

The officers arrested appellant, Vera and Drebert for vehicle theft. (5RT 2257.) Justine Capistrano was turned over to the Department of Social Services. (5RT 2317-2318.) Appellant, Vera, Drebert, and Pritchard were photographed at the West Covina Police Department in booking clothing. (5RT 2256, 2258-2259; Peo. Exh. 4 [Jan 19, 1996 photo of Vera]; Peo. Exh.

5 [Jan. 19, 1996 photo of Pritchard]; Peo. Exh. 16 [Jan. 19, 1996 photo of appellant]; Peo. Exh. 17 [Jan. 19, 1996 photo of Drebert].)

Around 9:30 p.m. on January 19, 1996, Detective Ferrari spoke with Gladys Santos, who was in custody at the West Covina Police Department for delaying a police officer in the performance of his duties. (5RT 2301-2302.) Detective Ferrari obtained consent from Ms. Santos to search her apartment located at 2001 West Garvey Avenue, number 38. Detectives arrived at the apartment around 1:00 a.m. on January 20, 1996, and searched the apartment for evidence pertaining to the assault on Michael Martinez. (5RT 2302-2303.) On the balcony in the kitchen eating area, the detectives found a white trash bag containing items that belonged to Martinez, including a backpack (Peo. Exh. 14), a wallet, and identification (Peo. Exh. 12). (5RT 2303-2305.) The detectives also searched the two upstairs bedrooms. (5RT 2305-2306.) A wallet containing a registration receipt bearing the name "John Capistrano" and other papers was discovered in a dresser drawer in the smaller bedroom. (5RT 2306-2307.)

When booked into custody, Drebert provided a home address of 3241 Frazier, number F, in Baldwin Park; Pritchard provided a home address of 3241 North Frazier, Number G, in Baldwin Park; and Vera provided a home address of 3249 Frazier, Number C in Baldwin Park. (5RT 2259-2262.)

Gladys Santos was given a ticket and released from police custody on January 20, 1996, based upon her promise to appear. (5RT 2307-2308, 2312.) Her case for interfering with a police officer was presented to the District Attorney's Office but did not meet the requirements for filing an offense. (5RT 2308, 2312.) It was rejected for filing within four or five days of January 19, 1996. (5RT 2317.)

7. Gladys Santos Inculpates Appellant In All Of The Crimes

In October 1995, Gladys Santos met appellant, who used the nicknames, "Johnny" and "Giant," at the home of her friend, Joanne Rodriguez, in the Lido Apartments in West Covina. (5RT 2424, 2427-2428.) Santos met Drebert and Pritchard, who used the nickname, "Little Giant," the next day at Rodriguez's apartment; they were with appellant. (5RT 2424-2425, 2429.) Drebert and Pritchard called appellant, "Dad." (5RT 2427-2428.) Appellant introduced Drebert and Pritchard as Justine's "big brothers." (6RT 2540.) Santos met Vera in late December 1995. He was with Drebert. (5RT 2425-2426, 2429.) Santos twice purchased a quarter gram of methamphetamine for appellant in October 1995. On the first occasion, Drebert picked up the drugs. On the second occasion, appellant's sister, Rebecca, picked up the drugs. (6RT 2518-2520.)

Beginning in December 1995, Santos kept Justine, whom she believed at the time to be appellant's daughter, three days a week. Appellant came to Santos's apartment to drop off and pick up Justine. Sometimes Drebert and/or Pritchard were with him. (6RT 2543-2544.) Most of the time, Jessica drove appellant. (6RT 2545.) In December 1995 and January 1996, Santos saw appellant, Drebert, and Pritchard on a regular basis. (5RT 2426.) She saw Vera with them on two occasions. (5RT 2426-2427.)

During the period including November 1995 through January 1996 Santos resided in Apartment 38 located at 2001 West Garvey. From December 1995 through January 1996, Justine lived with Santos. (5RT 2430-2431.) Santos's niece, the niece's boyfriend, and Santos's children also resided in Apartment 38. Appellant visited Justine at Santos's apartment approximately once a week. (5RT 2431.) Appellant stayed at Santos's apartment on the three nights prior to his arrest. (5RT 2431; 6RT 2553-2561.)

It was a two-bedroom apartment. Only one bedroom, the one occupied by Santos, had a bed in it. The other bedroom was occupied by Santos's niece. In December 1995, Justine slept in the other bedroom in a sleeping bag on the floor. (5RT 2432.) When appellant stayed overnight, he stayed in the room with Justine and Santos's niece. (5RT 2432-2433; 6RT 2553.) Drebert never spent the night at Santos' apartment. (6RT 2554.)

a. Events Of January 19, 1996

Santos was arrested on January 19, 1996, at her apartment when appellant, Drebert and Vera were also arrested. (5RT 2443-2444.) Earlier that evening, appellant, Pritchard, Vera, and Drebert had left the apartment and returned around 8:30 or 9:00 p.m. (5RT 2453-2454.) Appellant told Santos that he had "played baseball with Mike's head." (5RT 2454-2455.) Santos understood appellant to mean Michael Martinez. (5RT 2455.) When the police came to her apartment, appellant was there. Appellant had arrived with Drebert. Vera and Pritchard arrived separately. Justine had been at the apartment with Santos and had been staying with Santos for more than a week. (6RT 2560-2561.) Pritchard had left the apartment 20 minutes before the police arrived. The police brought Pritchard to the apartment door just prior to Santos's arrest. (6RT 2698.)

b. Stolen Property From The J.S./E.G. Robbery

Appellant brought a telephone answering machine (Peo. Exh. 22) to Santos's apartment in December 1995. (6RT 2520-2521.) The machine had been in the bedroom in which Justine slept. (6RT 2521.) When appellant brought over the answering machine, he also brought a dark gray Spectra laptop computer and a video rewinder to the apartment. The screen of the computer flexed when it was touched, felt like jelly, and the screen around the touched area turned iridescent colors. (6RT 2522-2524.) Santos did not see

anyone drop it off, but appellant asked her about the laptop during a telephone conversation, and Santos went to the refrigerator and opened the box. (6RT 2562-2564.) The laptop computer stayed at Santos's apartment for approximately one week until Drebert took it away. (6RT 2524-2525.)

On January 23, 1996, Detective Ferrari and three other detectives went to Ms. Santos's apartment and again spoke with her. (5RT 2308-2309.) During the interview, Ms. Santos gave Detective Ferrari a telephone answering machine (Peo. Exh. 22 [Panasonic answering machine serial no. 1CAHF150488].). (5RT 2309-2310; 6RT 2521-2522; 8RT 3151-3152.)

At trial, J.S. identified the answering machine as having been taken from her residence on December 15, 1995; the serial number on the machine matched the number listed on her repair receipt. (8RT 2971-2972, 3020.)

c. Stolen Property From The Weir Robbery

Appellant brought some jewelry (Peo. Exh. 31 [photograph]) to Santos's apartment in December 1995. (6RT 2525-2526.) The jewelry was in a cup in the bedroom Justine used. (6RT 2527.) Santos gave the jewelry to Detective Ferrari in January 1996. (6RT 2526-2527; 8RT 3152-3153.) Ms. Santos came to the police station on her own and was not under arrest. She was not in custody and had not been charged with a crime. (8RT 3153.)

The jewelry was returned to Ruth Weir. (8RT 3087-3088, 3091, 3153-3154.)

d. Appellant's Admissions To Santos Concerning The Murder Of Koen Witters

In December 1995, Santos had a conversation with a civilian who claim to have been present when a murder was committed. (5RT 2433-

2434.)[12/] The conversation occurred on the speaker's birthday, which was prior to Christmas. (5RT 2434.) Three days after this conversation, Santos asked appellant about the murder. The conversation occurred in Santos's apartment. (5RT 2435.) Santos asked appellant, "Is it true? Did you really kill somebody with a belt?" (5RT 2436.) In response, appellant laughed. Santos asked him again, "Is it true?" Appellant replied, "That pussy Mike told you, huh?" (5RT 2438.) Santos replied, "No." Appellant stated that Mike was weak. Santos again denied that "Mike" had told her. Santos asked, "Did you really do that?" Appellant replied, "Yes." Santos then asked, "Why did you do it?" Appellant changed the subject. (5RT 2439.)

Later, after Santos again resumed the subject, appellant shared details and demonstrated for Santos how he had used a belt to kill someone. (5RT 2439-2441.) Appellant said the murder occurred in an apartment "they had been watching" in order to commit a robbery. (5RT 2441.) Appellant said the victim had been shaving, and he killed the person because he had seen appellant without a mask. He strangled the person because using a gun would be too loud. Appellant said he was with Drebert and "Little Giant" when the murder occurred. (5RT 2442.) Appellant said that after he attempted to strangle the victim, he left the room. When he returned, the victim was not dead. Appellant called Mike into the room to hold one end of the belt because "the motherfucker wouldn't die." Appellant initially said he "shanked" the

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12. Appellant's counsel elicited additional information about this conversation during cross-examination. (6RT 2548-2551.) Several days before Christmas 1995, someone knocked on the door to Santos's apartment and she answered. Two people were outside, and she let them in. The person who told her about the murder appeared to have been drinking. She described him as "marinated." The person said "they" had been scoping a residence and appellant had seen the person shaving. (6RT 2548-2550.) He tied the victim at appellant's direction. The victim liked to travel, liked Europe, liked Asian women, and was preparing to travel. (6RT 2550.) He assisted in strangling the victim. (6RT 2550-2551.)

victim. Later during the conversation, appellant said, "Well, the motherfucker wouldn't die, so I cut him." (5RT 2443.)

After the conversation about the murder, Santos had a telephone conversation with appellant about a desktop Apple MacIntosh computer. (5RT 2447, 2461.) Appellant asked if Santos knew anyone who wanted it. Appellant described the computer to her and said it had everything on it. (5RT 2447-2448.) This phone conversation occurred before Christmas. (5RT 2449.)

About one week prior to her arrest on January 19, Santos again asked appellant about the murder because she did not believe it was true. (5RT 2443-2445.) Appellant confirmed it was true. (5RT 2445.) When Santos asked how he could kill a person they had become acquainted with, appellant said, "We didn't get to know him. He's just somebody that liked Asian pussy." (5RT 2445, 2447.) Appellant also said that the person "liked to travel to Europe." (5RT 2447.) Previously, the person who originally told Santos about the murder had said that they had talked to the victim prior to the murder. (5RT 2446.)

e. Appellant's Admissions To Santos Concerning The Weir Robbery

One night, appellant called Santos and asked her to pick him up at a location near the Lido Apartments. (5RT 2450.) Santos asked appellant what he had been doing. Appellant said, "We just robbed somebody." Appellant then directed Santos to a residence in West Covina. He told her that a police officer lived in the house. (5RT 2449-2450.) The house was near a school and was approximately four blocks from the Lido Apartments. (5RT 2451.) Appellant also said they had taken the Christmas presents, a white car, and groceries during the robbery. (5RT 2453.) Appellant also directed Santos to a location where he said he had hidden some coins and other items he had

taken from the residence. (5RT 2450, 2452.) Appellant got out of the car and picked up a branch. He returned to the car and said nothing was there. (5RT 2452-2453.)

f. Santos's Revelation Of Appellant's Admissions To Police

Between her arrest in January 1996 and her conversation with Detective Ferrari in May 1996, appellant contacted Santos many times. He told her that he loved her and told her not to say anything. During the last few contacts, he said he had heard that she was a snitch. He threatened to kill her if she told anyone, but then said he would kill her sons instead. (5RT 2457-2458; 6RT 2694.) Santos believed him. (5RT 2457.) Appellant began threatening her in February. The calls and threats became more frequent and more serious over time. (6RT 2570.) Appellant left nasty messages on her phone. (5RT 2459.) Appellant threatened to kill her children in late March or April, before Easter. (6RT 2571.) Santos accepted collect calls from appellant because she was afraid appellant would hurt her family and kill her children. (6RT 2696.) Santos feared that refusing to accept his calls would suggest to him that she had turned him in or was cooperating with the police. (6RT 2696-2697.) Santos ultimately told the police because she felt guilty and was afraid. (5RT 2457-2458.)

On May 15, 1996, Detective Ferrari went to Santos's apartment at her request. (6RT 2572; 8RT 3154.) When he arrived, Santos was crying and appeared to be upset and to have been crying for some time. (8RT 3154-3155.) Detective Ferrari listened to a message that was recorded on Santos's voice mail. He recognized the voice as belonging to appellant. In the message, appellant said that he had received copies of police reports stating that she had talked to the police. He was going to send her copies of the reports and "he was gonna see what he had to do." (8RT 3155.) As of May

15, 1996, Santos had not provided the West Covina Police Department with any significant information relevant to the Michael Martinez investigation or the other robberies being investigated by West Covina police. (8RT 3155-3156.) She had previously provided the telephone answering machine and the gold chains belonging to Ruth Weir and had mentioned that appellant had asked her about selling a large desktop Apple Macintosh computer. That information was documented in a police report. (8RT 3156-3157.) The report authored by Detective Ferrari prior to May 15 had been provided to the defense for purposes of discovery in the criminal prosecution. (8RT 3159.)

Santos provided Detective Ferrari with information regarding the murder that occurred in Rowland Heights on May 21, 1996. (8RT 3158-3159.) At the time Santos told Detective Ferrari about appellant's statements admitting he had killed someone with a belt, Santos was not under arrest and was not charged with anything. She did not tell the police about these statements prior to May 1996 because she was afraid of appellant. (5RT 2455-2456.) Santos was on misdemeanor probation when she spoke to Detective Ferrari at the West Covina Police Station in May 1996. (6RT 2518.)

The District Attorney's Office helped Santos relocate in June 1996 because Santos had been threatened by appellant. The police or District Attorney's Office paid the security deposit for Santos's new apartment. She paid the rent and utilities. (6RT 2527-2528.) Santos asked for assistance relocating on June 18. Relocating was not discussed during her May 1996 conversation with Detective Ferrari. (6RT 2545-2546.)

8. Proximity Of Relevant Locations

As of October 1996, appellant's mother resided at 11149 Loch Avon Drive in Whittier, California. On January 19, 1996, when appellant was arrested for the attempted murder of Michael Martinez, appellant gave his

mother's address to the West Covina Police Department booking officer as his residence address. (8RT 3137.) The residence of J.S. and E.G. was within two miles of 11149 Loch Avon Drive. (8RT 3143.)

The apartments located at 3249 Frazier Street and 3241 Frazier Street in Baldwin Park – the home addresses provided by Drebert, Pritchard and Vera when booked on January 19, 1996 (5RT 2259-2262) – were within the same apartment complex. (8RT 3144.) The residence at 12702 Salisbury Street (where J.S.'s Honda was recovered) was located at the intersection of Salisbury and Syracuse Street in Baldwin Park in a neighborhood of single family residences. (8RT 3145.)

Ruth Weir's car was recovered from 1701 West Garvey in West Covina (Wesco Auto Parts), which is near Gladys Santos's apartment at 2001 West Garvey. (8RT 3160-3161.) Martinez's vehicle was recovered at 2145 West Garvey Avenue. (5RT 2295-2296.) That location is approximately two blocks from the apartment complex located at 2001 West Garvey Avenue where Gladys Santos resided. The Lido Garden Apartments are located within a half mile of 2145 West Garvey Avenue. (5RT 2297.) Ruth Weir's residence was less than a half mile from the Lido Apartments. (8RT 3161.)

B. Defense Evidence

Twenty-two-year-old Jessica Rodriguez and Joanne Rodriguez were sisters. Appellant was their cousin. (9RT 3280-3281.) Jessica's grandmother was also appellant's grandmother. (9RT 3301.) Jessica's grandparents lived on Moral Street in Whittier, and her grandmother lived in the same house at the time of trial. (9RT 3300.) Appellant was five or six years older than Jessica. (9RT 3295.) Jessica had known appellant her entire life. (9RT 3290.) She grew up living across the street from the house in Whittier where he lived with his mother and his father. (9RT 3292, 3295.) When Jessica was

around six years old, appellant and his mother moved to El Monte. At that time, appellant was around 11 years old. (9RT 3295-3296.)

In October 1995, appellant began to reside with Joanne and Jessica in their apartment on Garvey in West Covina. (9RT 3280-3281.) Jessica and Drebert met and began dating in December 1995. She saw him nearly every day. Drebert was always with appellant. (9RT 3283, 3287.) Drebert called appellant, "Dad." (9RT 3284.) Drebert, appellant, Vera and Pritchard stayed in the apartment with Jessica and Joanne. (9RT 3287.) From early December until January 16, when she saw Drebert, he was with Pritchard, Vera, and appellant. (9RT 3285-3287.)

Michael Martinez came to the Rodriguez's apartment with appellant and ate or drank beer in the apartment on several occasions. Martinez visited both the interior of the apartment and the patio of the apartment – probably in November 1995. (9RT 3281, 3289.) On a few occasions when Martinez visited the apartment, Jessica saw appellant and Martinez walking together from Martinez's apartment to her apartment. Other times, Martinez was alone and appellant was already inside Jessica's apartment. (9RT 3290.)

Jessica and Joanne were evicted from their apartment in early December 1995. (9RT 3281, 3288.) Shortly thereafter, Martinez volunteered to allow Jessica, appellant, Drebert, Pritchard, and Justine to stay at his apartment for a couple of nights. (9RT 3281-3282.) Jessica stayed in Michael Martinez's apartment on several nights after she and her sister were evicted. (9RT 3288.)

To Jessica's knowledge, Justine was not appellant's biological daughter, but he treated her as a daughter. (9RT 3283, 3287-3288.)

In December 1995 and on January 16, Jessica Rodriguez owned the car depicted in People's Exhibit 6. (9RT 3292-3293.) Jessica's mother, Theresa Wheatley, gave Jessica the car. No one else had access to or used the car.

Jessica kept the keys to the car in her purse. During the period while Vera, Pritchard, Drebert and appellant stayed in Jessica's apartment, she kept her purse downstairs when she slept upstairs. (9RT 3293-3294.)

On December 9, 1995, Jessica was with Drebert for part of the afternoon and again later in the evening after it was dark. (9RT 3301-3302.) Drebert drank Jack Daniels and beer that evening over a couple of hours. (9RT 3297-3298.) When Jessica saw Drebert drinking, he was able to walk and talk without slurring his speech. (9RT 3294-3295.)

On January 16, 1996, Jessica was arrested in Montebello with Vera and Drebert. Jessica stopped associating with them because the detective told her that he would have her daughter taken away. Some ski masks were found in Jessica's car during the arrest; the masks caused Jessica to believe that they were involved in something that she should not be around. (9RT 3286-3287.)

After the arrest in Montebello, Jessica once visited with Drebert at Lisa Lucero's apartment in Baldwin Park. (9RT 3305-3306.) Lisa Lucero was appellant's girlfriend for many years. (9RT 3308-3309.) She lived on Frazier Street. Eric Pritchard is Lisa Lucero's son. Michael Drebert lived with Lisa Lucero before he began to live with Jessica and Joanne. (9RT 3307-3308.)

William Vicary, a medical doctor specializing in psychiatry, physically examined appellant on August 12, 1997, and reported his findings. (9RT 3318-3332.)

II. Penalty Phase Evidence

A. Prosecution Evidence

Certified documents from the California Department of Corrections indicate that appellant was convicted of a felony, sale of marijuana, on December 13, 1989, and felony taking of a vehicle without consent on September 9, 1994. (11RT 3929; Peo. Exh. 55 [certified documents].)

1. Attack On Los Angeles County Jail Inmate Victor Rodela On June 4, 1994

At appellant's trial, Victor Rodela was serving an 11-year state prison sentence for carjacking. He had a number of other felony convictions and had been in and out of custody. (11RT 3854-3855, 3860.) Rodela defined a "snitch" as someone who testified against someone else. A snitch could be killed or beaten. (11RT 3858-3860.)[13/]

On June 4, 1994, Los Angeles County Deputy Sheriff Gregory Icamen was assigned to the 9000 floor of the Los Angeles County Jail located on Bauchet Street in Los Angeles. Inmates housed on the 9000 floor were awaiting classification; once classified, the inmates were moved to their assigned housing. (11RT 3862.) Dorms 9300 and 9400 were both located on the 9000 floor. (11RT 3862-3863.)

On June 4, 1994, Deputy Icaman investigated an assault upon Victor Rodela in the 9300/9400 dorms. Rodela told him that an inmate -- whom he later identified as appellant -- had approached him and said, "This is a straight dorm. Why are you here?" Rodela replied that he had not yet been classified. (11RT 3863-3864.) Appellant then said, "Well, we'll classify you then," and kicked and punched Rodela's head, face, back, and legs. (11RT 3868.) Rodela had a swollen and bloody upper lip and complained of pain to his jaw, back, ribs, and groin. (11RT 3869.) Rodela described his attacker as having the name, "Capistrano," tattooed across his chest and later identified appellant to Deputy Icaman. (11RT 3864-3867, 3872-3873.) Rodela told Deputy

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13. Rodela denied being attacked in the County Jail in June 1994, denied that appellant approached and confronted him about being homosexual, denied that appellant punched him several times in the face and body, denied telling a deputy that the man who attacked him had "Capistrano" tattooed across his chest, and denied he had recognized appellant. (11RT 3855-3858.)

Icamen that he was homosexual and that several inmates living within the dorm knew his sexual orientation. (11RT 3864.)

2. Attack On Los Angeles County Jail Inmate Ricky Crayton On October 4, 1996

On October 4, 1996, Deputy Keen was working in the security area for Module 3400, the gang module within the Men's Central Jail. (11RT 3909-3912.) Inmate Ricky Crayton was working as a "trustee" collecting food trays from the rows in module 3400. After Crayton entered the sallyport to row B, Deputy Keen closed the entry gate and opened the gate to the row. Deputy Keen saw Crayton bend down inside the gate. Crayton then suddenly fell back into the sallyport. Crayton was holding his mouth; blood streamed between his fingers. (11RT 3912-3915.) Deputy Keen asked what had happened. Crayton replied that he had been kicked in the mouth. (11RT 3916.) Crayton appeared to have a broken jaw and was bleeding profusely. (11RT 3918.)

Deputy Keen saw appellant and inmate Pineda running down the row. Deputy Keen called them back and summoned additional deputies. (11RT 3916-3919.) Deputy Ted Carraisco ordered appellant and Pineda off the row, handcuffed them, and took them to the main floor hallway. (11RT 3919, 3922-3925.) As they walked, Deputy Carraisco asked them, "What happened?" Neither responded. Deputy Carriasco sat Pineda on a bench in the hallway and walked with appellant down the main floor hallway. As they walked, appellant said that he, not Pineda, had kicked the trustee. (11RT 3925-3927.) Appellant and Pineda had been serving as trustees that day. As a result of the incident, appellant was placed in a single-man cell without phone or visitation privileges. (11RT 3927-3928.)

3. Appellant's Threat Against Drebert On December 20,1996

On December 20, 1996, Los Angeles County Sheriff's Deputy William Wenzel was working as a bailiff at the Citrus Municipal Court located in West Covina, California. When Deputy Wenzel brought appellant into a courtroom for an appearance in the case *People v. John Capistrano and Michael Drebert*, Drebert and three other inmates were seated in the courtroom's jury box. Appellant looked at one of the inmates and mouthed the words, "Get that fucker," and nodded toward Drebert. (11RT 4061-4065.) The other inmate – who was Hispanic, had a shaved head, and had prison tattoos – looked at Drebert and then back at appellant. (11RT 4065, 4068.) Because Deputy Wenzel believed Drebert's life was in danger, he arranged for Drebert's status to be changed to K-10, meaning "keep-away." (11RT 4065.)

4. Attempted Murder Of Men's Central Jail Inmate Mauricio Gonzalez On February 18, 1997

Los Angeles County Deputy Sheriff Joe Mendoza testified as an expert on Hispanic prison gangs and Hispanic street gangs. (11RT 4004-4008.) Generally speaking, prison gangs exist to control criminal activity and provide their members protection within the prison system. (11RT 4011-4013.) The Mexican Mafia, also known as "La EME," is a prison gang that recruits members of Southern California Hispanic street gangs entering the jail or prison system. (11RT 4008-4009.) La EME designates itself with the number 13 because "M" is the thirteenth letter in the alphabet. Nuestra Familia is a prison gang that recruits members of Northern California street gangs and designates itself with the number 14 because "N" is the fourteenth letter in the alphabet. (11RT 4009-4010.) The Mexican Mafia tends to recruit from gangs located south of Bakersfield and calls its recruits "surenos" meaning "southern." (11RT 4010-4011.) Most Hispanic southern California street

gangs are sympathizers with the Mexican Mafia. (11RT 4013.)

Outside the prison system, Hispanic street gangs often fight one another. Once inside the prison system, Hispanic gang members tend to unite along racial lines and claim loyalty to the Mexican Mafia. (11RT 4014-4015.) The Mexican Mafia also exerts control over the activities of some Hispanic streets gangs outside the prisons by setting rules for the gangs to follow when they have disputes. (11RT 4015-4016.) One Mexican Mafia rule is a "no drive-by rule," meaning that the Mexican Mafia has ordered that no shootings occur from cars to avoid killing non gang-affiliated bystanders. When Hispanic gang members violate this rule and come into custody, they are placed on a "hit list" and targeted for assault or must pay a monetary tax. (11RT 4016-4017.) The terms "green light" and "in the hat" signify that a person is on a Mexican Mafia hit list targeted for assault. (11RT 4023.) The Mexican Mafia also requires that Hispanic street gangs pay "taxes," meaning a percentage of the narcotics sales within the gang's territory, to the Mexican Mafia. (11RT 4017-4018.)

There are different levels of association with the Mexican Mafia. The highest level is member. "Associates" pass messages or make phone calls for members. A "soldier" enforces rules. "Torpedos" are given tasks, such as to kill or stab someone; they complete the task without regard for the consequences. (11RT 4019-4020.)

Southern California Hispanic gang members can show allegiance to the Mexican Mafia through their tattoos. Mexican Mafia members frequently bear tattoos with the letter "M" or an Aztec warrior symbol or Mexican eagle. Street gang members may have a tattoo, "Sur Trece Sureno," meaning "Southern United Raza, thirteen, southern." (11RT 4021-4022.) A street gang member with a tattoo "Sur Trece" or "Trece Sureno" signifies allegiance to the Mexican Mafia. (11RT 4022-4023.)

Deputy Mendoza was acquainted with appellant, who was a member of the El Monte Flores gang. Appellant has a tattoo, "EMF," meaning El Monte Flores, on the back of his head. He has the letters "SUR 13" tattooed on the knuckles of his right hand. (11RT 4029-4032.) Appellant's gang moniker was "Giant." (11RT 4032.)

Jail "kites" are notes inmates write to one another. (11RT 4032.) On October 17, 1996, during a random search of inmates at the Pomona Superior Court for narcotics, appellant removed a quarter-sized balloon from his pocket. (11RT 3992-3995.) The balloon contained three jail "kites." (11RT 3995-3996; Peo. Exhs. 64 and 65 [photographs of kites].) One was addressed to "Pelon." (11RT 3996.) Luis Maciel, a member of the Mexican Mafia currently incarcerated in the County Jail, used the moniker Pelon. Maciel was also a member of the El Monte Flores gang. (11RT 4033-4034.) Maciel oversaw Mexican Mafia activity in the jail system. (11RT 4034-4035.) This kite appeared to have been authored by appellant because it bore the following valediction: "CMR Giant, EMF," meaning "Con mucho respectos Giant, El Monte Flores." (11RT 3996-3999; Peo. Exh. 63 [photograph of kite].) In the kite authored by appellant, appellant refers to himself as a solider. Appellant stated he would do anything for Maciel and that he would not be getting out. (11RT 4035-4041.)

On February 18, 1997, the Marvilla street gang was on the Mexican Mafia's "hit list" because the gang refused to pay taxes to the Mexican Mafia. (11RT 4023-4025.) Because of this situation, Maravilla gang members were specially housed within the Los Angeles County Jail. (11RT 4025-4026.) Members of the Maravilla street gang were segregated from other gang members and housed on Row A and Row C of Module 3200 so that they would not be attacked by other inmates. (11RT 3942-3943.)

On February 18, 1997, Deputy Chapman was escorting inmate Mauricio Gonzalez, a Maravilla gang member, back to his cell in Module 3200, Row A. (11RT 3950-3951.) Gonzalez's hands were cuffed behind his back and attached to a waistchain. (11RT 3961.) Deputy Chapman and Gonzalez entered the sallyport providing access to Module 3200 Row A and Module 3400 Row B. At that point, Deputy Chapman saw two inmates on Module 3400 Row B. (11RT 3945, 3962-3963.) Deputy Chapman turned away from Gonzalez to speak with the Module 3200 deputy about Gonzalez's paperwork. Deputy Chapman heard screams and deputies yelling. He turned and saw appellant and inmate Arthur Ferrell stabbing Gonzalez with shanks. Deputy Chapman and the other deputies in the security cages ordered appellant and Ferrell to stop. Deputy Chapman struck Ferrell on the head with a flashlight, and Ferrell fell to the floor. Appellant continued to stab Gonzalez as Gonzalez moved behind Deputy Chapman. Appellant lunged at Deputy Chapman–who was then between Gonzalez and appellant–with a shank. Deputy Chapman struck appellant with a flashlight when appellant failed to obey commands to stop. (11RT 3963-3973.) The other deputies handcuffed Ferrell and appellant and removed them from the module. Gonzalez was taken to the clinic. (11RT 3973-3974.) After the attack, Gonzalez was bleeding from his head and upper torso. (Peo. Exh. 61 [photographs]). Appellant and Ferrell were bleeding as a result of being struck by the flashlight. (11RT 3974-3976.) A "shank"–a jail-made stabbing device–was found at the gate to Row A of Module 3200. (11RT 3974, 3981-3983.)

In Deputy Mendoza's opinion, the Mexican Mafia "hit" on all Maravilla gang members was a motive for the assault by appellant and Arthur Ferrell upon Mauricio Gonzalez. (11RT 4041-4042.) The parties stipulated that appellant was convicted of attempted murder for his attack on Gonzalez and found not guilty of assault upon Deputy Chapman. (11RT 3979-3980.)

5. Attack On Los Angeles County Jail Inmate Raymond Gonzalez On June 23, 1997

On June 23, 1997, Raymond Gonzalez, who was being held at the Los Angeles County Jail awaiting trial for armed robbery, was transported to the Pomona Superior Court to testify as a witness in another case. (11RT 3841-3842, 3849.) He was transported on a bus with other inmates, including appellant. (11RT 3843.) Gonzalez rode in the front part of the bus, which was designated for "keep away." (11RT 3852.) Gonzalez was a "K-10" or "keep away" inmate status because he was a prosecution witness in another three-defendant case. (11RT 3842, 3849-3850.) When Gonzalez arrived at the court, he was taken to a holding cell with appellant and other inmates. (11RT 3842.) All of the inmates wore chains on their feet. (11RT 3851.) Gonzalez was a member of the 12th Street gang in Pomona. Several of the other inmates in the cell were Azusa gang members. Gonzalez previously got along with them. (11RT 3851-3852.)

While Gonzalez was waiting to testify, appellant and the other inmates beat and kicked him. No one said anything to Gonzalez before the beating began, and Gonzalez did not know who hit him first. Appellant hit Gonzalez in the face multiple times while Gonzalez was seated on a bench inside the cell. Gonzalez fell to the floor and was kicked by the inmates for about three minutes. (11RT 3843-3846.) Deputy Edward Borunda, a courtroom bailiff, heard muffled screams for "help" and a banging sound emanating from the holding area. (11RT 3825-3828.) Deputy Borunda entered the lock-up and went to the cell where the noises emanated. (11RT 3829-3830.) Gonzalez, appellant, and inmates Ferrell, Ramirez, and Manriquez were inside the cell. (11RT 3831, 3838.) When Deputy Borunda opened the cell door, he saw that Raymond Gonzalez had a bloody face. Appellant stood about two to three feet from Gonzalez. Appellant's hands were at his sides. (11RT 3831, 3839.)

Appellant backed up and sat down. (11RT 3832.) The knuckles of appellant's hands were reddened. (11RT 3833.) Gonzalez had a golf-ball size knot on his forehead, his eye was swollen, his nose was bloody, and he had blood on his lip and around his teeth. (11RT 3833-3834.) As Gonzalez was taken from the cell, one of the inmates yelled that Gonzalez was a "snitch." (11RT 3844, 3846-3847.)

Gonzalez did not tell the investigating deputy who had hit him because he was concerned for his safety. Paramedics transported Gonzalez to Pomona Valley Hospital. He was treated and returned to the courthouse several hours later. (11RT 3834-3835, 3847-3849.) As a result of the beating, Gonzalez's left eye was swollen shut, he had two fractured ribs, and his face was swollen. (11RT 3848.)

Gonzalez was subsequently convicted of armed robbery and sentenced to prison. (11RT 3841.)

B. Defense Evidence

Claudia Meza met appellant through her cousin and had known him for 11 years. Throughout that time, he was in and out of jail. In October 1995, appellant and Meza began dating. Prior to his arrest on January 19, 1996, Ms. Meza saw appellant about three times a week. During that period, Meza did not meet any of appellant's friends. He did not participate in gang activities or take drugs. He planned to begin working with Meza's aunt as a certified nurse's assistant. (12RT 4149-4152.) Appellant told Meza that he had always been in and out of jail. He wanted to change his life and get a job. He was looking into getting his tattoos removed. (12RT 4151-4152.)

Appellant's father, John Catano, testified on appellant's behalf. Appellant's mother was Rosella Rodriguez. Appellant's father, John Catano, was incarcerated at the time appellant was born on April 30, 1970. (12RT 4154-4155.) He had been convicted of attempted murder and assault. (12RT

4155-4156.) Catano had spent most of his adult life in prison. (12RT 4163.) Catano last saw appellant in July 1990 when they were both in custody. Appellant testified for Catano on a charge that resulted in his current prison sentence. (12RT 4162-4163.)

Catano and Rodriguez were together off and on from 1972 until 1975. From 1975 through 1990, Catano and Rodriguez lived in Whittier with appellant and his sisters, Marlene and Rebecca. (12RT 4156-4157.) Rodriguez's parents lived in Whittier, as did her brother and other family members. (12RT 4167-4168.) Catano had a drug problem. Appellant's mother had a drinking problem. They fought constantly and frequently separated. In 1976, Catano was incarcerated for one year for a parole violation. From 1988 until 1990, Catano was again in prison. In 1987 or 1988, the family moved to El Monte, but appellant did not move with the family. (12RT 4157-4158.)

In late 1980's, Catano learned that appellant had joined the El Monte Flores gang. Catano and appellant share similar tattoos on their faces, upper torso, stomach, and ear lobes. (12RT 4159-4161.) When appellant was 16 or 17 years old, Catano visited appellant at the California Youth Authority and tried to convince appellant to take a different path from his own. (12RT 4161, 4164-4165.) Catano had been incarcerated again by the time appellant was released. (12RT 4165.)

Appellant did not testify on his own behalf. (12RT 4169.)

ARGUMENT

I.

APPELLANT WAIVED HIS CLAIM CONCERNING THE ADEQUACY OF THE INITIAL DEATH-QUALIFICATION QUESTIONING AND, IN ANY EVENT, THE TRIAL COURT PROPERLY EXCUSED FOR CAUSE 22 PROSPECTIVE JURORS WHO UNEQUIVOCALLY STATED THEY WOULD BE UNABLE TO VOTE FOR A PUNISHMENT OF DEATH REGARDLESS OF THE EVIDENCE

Appellant contends, as his first claim on appeal, that the trial court's death qualification voir dire was constitutionally deficient and its excusal of 22 prospective jurors for cause requires reversal of the death judgment. (AOB 30-60.) Here, each of the 22 excused prospective jurors unequivocally informed the court they would be unable or unwilling to impose the death penalty regardless of the evidence or circumstances presented to them. Thus, there was substantial evidence in the record to support the trial court's ruling that the jurors' views of capital punishment would "prevent or substantially impair" the performance of the juror's duties. Accordingly, appellant's claim should be rejected.

A. Summary Of Jury Selection Proceedings

On July 16, 1997, appellant filed a motion for sequestered voir dire. (3CT 683-686.) The motion argued that the trial court had discretion, under Code of Civil Procedure section 223, to permit sequestered, individual voir dire (3CT 684) and that the type of voir dire articulated in *Hovey v. Superior Court* (1980) 28 Cal.3d 1, was "the most effective method of preventing prospective jurors from being influenced by others in the responses to the death-qualification aspect of the voir dire process and enabling the parties to discover bias." (3CT 685.)

On the morning of October 8, 1997, counsel made their first appearance before the judge who presided over appellant's trial. Appellant was not present. The parties represented to the court that the only pending pre-trial motion was appellant's motion for sequestered voir dire as to death qualification. Appellant had not waived his presence for the hearing on that motion. (1RT 1011-1012.) The parties agreed to defer the sequestered voir dire motion until the day jury selection commenced in appellant's case. (1RT 1014.) The trial court's subsequent denial of this motion is addressed in Argument III, *post.*

Jury selection commenced on October 10, 1997, after the parties stipulated that a time-qualified jury could be summoned for the trial. (3CT 827.) The court utilized a juror questionnaire (3CT 830-837) that focused solely upon the jurors' view of capital punishment.

1. Screening Of The First Panel Of Jurors

Jury selection commenced at 9:48 a.m. on Friday, October 10, 1997. (2RT 1248-1290.) After the first panel of prospective jurors were sworn (2RT 1248, 1265), the court reviewed the prospective jurors for financial hardships and 14 prospective jurors were subsequently excused. (2RT 1249-1265.) The trial court then provided the remaining panelists a brief overview of the case, including that appellant was charged with "various felonies, including one count of murder in the first degree," it was alleged that "special circumstances exist" given the manner in which the murder was committed, and that, if the jury found appellant guilty of first degree murder and found the special-circumstance allegations to be true, the jury would have to determine whether the penalty should be affixed at death or life without the possibility of parole. (2RT 1265-1267.) The trial court then posed the following question to the group: "Now, without knowing anything at all about this case, is there any juror sitting in the audience right now that, regardless of what the evidence

might be, has such feelings about the death penalty that he or she would be unable to impose the death penalty in this case?" (2RT 1267.) Ten prospective jurors responded affirmatively; they were questioned individually and excused by the court (2RT 1267-1271), as summarized below.[14/]

> THE COURT: I need to know your name.
> PROSPECTIVE JUROR [M.]: [C. M.]
> THE COURT: Miss [M.], that is regardless of what the evidence is; is that correct?
> PROSPECTIVE JUROR [M.]: Yes.
> THE COURT: All right. You are excused.

(2RT 1267-1268.)

> THE COURT: Your name, sir?
> PROSPECTIVE JUROR [C.]: [S. C.]
> THE COURT: And Mr. [C.], that is regardless of the evidence; is that correct?
> PROSPECTIVE JUROR [C.]: Yes.
> THE COURT: You are excused.

(2RT 1268.) At this juncture, appellant's counsel articulated the following objection, "Your Honor, for purpose of the record, we ask that the jurors not be excused, object to their being excused, and ask in the alternative that they be allowed to participate in a pool of jurors that determine the guilt phase, at least, of the trial." (2RT 1268.) The court overruled the objection and continued, as follows:

> THE COURT: Your name, ma'am?
> PROSPECTIVE JUROR [G.]: [D. G.]
> THE COURT: Miss [G.], your answer is that you would be unable to vote to impose the penalty of death, regardless of the evidence?
> PROSPECTIVE JUROR [G.]: Yes.
> THE COURT: You are excused. Thank you.

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14. Being cognizant of changes in the law, as well as the policy of the courts regarding juror confidentiality, respondent will refer to the prospective jurors by initials. However, the jurors are referred to by name in the record, and Appellant's Opening Brief also refers to the prospective jurors by name. (See AOB 30-37.)

(2RT 1268.)

THE COURT: And you, Miss [O.]?
PROSPECTIVE JUROR [O.]: Yes.
THE COURT: And your answer would be the same?
PROSPECTIVE JUROR [O.]: Yes, sir.
THE COURT: Regardless of the evidence, you would be unable to vote to impose the punishment of death?
PROSPECTIVE JUROR [O.]: Yes. I just don't believe in the death penalty.
THE COURT: Thank you. You are excused.

(2RT 1268-1269.) The proceedings continued, as follows:

PROSPECTIVE JUROR [U.]: [A. U.].
THE COURT: Miss [U.], regardless of the evidence in this case, you would be unable to vote to impose the punishment of death; is that correct?
PROSPECTIVE JUROR [U.]: Correct.
THE COURT: And that would be in any case; is that correct?
PROSPECTIVE JUROR [U.]: Right.
THE COURT: You are excused, as well.

(2RT 1269.)

THE COURT: And you, as I recall, are Miss [A.].
PROSPECTIVE JUROR [A.]: Yes.
THE COURT: And you would be unable to vote to impose the punishment of death in any case; is that correct?
PROSPECTIVE JUROR [A.]: Yes.
THE COURT: Regardless of the evidence?
PROSPECTIVE JUROR [A.]: Yes.
THE COURT: You are excused, as well.

(2RT 1269.)

THE COURT: Miss [W.], you would be unable to vote to impose the death penalty in this case or any case, regardless of the evidence; is that correct?
PROSPECTIVE JUROR [W.]: Yes.
THE COURT: You are excused, as well. Thank you.

(2RT 1270.)

THE COURT: In the back row, your name, please? [¶] Excuse me, the second row.
PROSPECTIVE JUROR [L.]: [T. L.]

THE COURT: Miss [L.], you would be unable to vote to impose the punishment of death in this case, regardless of the evidence?
PROSPECTIVE JUROR [L.]: That is correct, sir.
THE COURT: You are excused.

(2RT 1270.)

THE COURT: And the lady next to her?
PROSPECTIVE JUROR [M.]: [Z. M.]
THE COURT: Yes. And you would be unable to vote to impose the punishment of death in this case or any case, regardless of the evidence?
PROSPECTIVE JUROR [M.]: Yes.
THE COURT: Thank you.

(2RT 1270-1271.)

THE COURT: And finally, you name, ma'am?
PROSPECTIVE JUROR [S.]: [A. S.]
THE COURT: And Miss [S.], you would be unable to vote to impose the – actually, I should say you would be unwilling to impose the death penalty in this case or any case, regardless of the evidence?
PROSPECTIVE JUROR [S.]: Yes.
THE COURT: Thank you. You are excused also.

(2RT 1271).

After excusing these prospective jurors, the trial court asked the panel members whether any of them would be unable to vote for life without the possibility of parole. No juror responded in the affirmative, and the proceedings continued. (2RT 1271.) The trial court then described the eight-page juror questionnaire. (2RT 1272.) The jurors were provided the questionnaire and instructed to complete it and return at 1:30 p.m. (2RT 1272, 1289.)

2. Screening Of The Second Panel Of Jurors

A second panel of jurors was brought into the courtroom and sworn on the morning on October 10, 1997. (2RT 1274.) Eight prospective jurors were excused for financial hardship based upon the stipulation of the parties. (2RT 1275-1281.) The trial court then provided a brief overview of the case,

including that the case charged appellant with committing "a number of different felony offenses. One of those is the crime of murder in the first degree." The court further explained that "It is alleged also that because of the manner in which the killing occurred, that special circumstances exist in this case." Therefore, if the jury found appellant guilty of first degree murder and found the special circumstances to be true, the jury would be asked to determine whether the penalty should be affixed at death or life without the possibility of parole. (2RT 1282-1283.) The trial court then asked the panel, as a group, whether any of them would be unable to vote for death as a punishment:

> Now, people do tend to have strong opinions when it comes to the death penalty, and people are certainly entitled to have those opinions, and no such opinion is right or wrong, but we do need to find out what your feeling is in general on the death penalty before we can proceed any further, so I'm going to ask you first the following couple of very general questions. [¶] The first question is this: [¶] "Because of your feelings about the death penalty in general, is there anyone who would be unable to vote to impose the punishment of death in this case or in any case, regardless of the evidence?"

(2RT 1282-1283.) The trial court repeated the question, "Would you be unable to vote to impose the punishment of death in this case or in any case, regardless of the evidence?" in response to an inquiry from one prospective juror. (2RT 1283.) Six prospective jurors responded affirmatively to the question and stood. The six prospective jurors were individually questioned and excused by the court as follows:

> THE COURT: Your name, please?
> PROSPECTIVE JUROR [W.]: I just don't believe --
> THE COURT: I need your name.
> PROSPECTIVE JUROR [W.]: [A. C. W.].
> THE COURT: And Miss [W.], you would be unable to impose the death penalty in this case or any case, regardless of the evidence; is that correct?
> PROSPECTIVE JUROR [W.]: Yes.

THE COURT: You are excused. Thank you [¶] I assume you're making the same objection as before?
[Appellant's counsel]: Yes.
THE COURT: Made and overruled.

(2RT 1283-1284.) The court addressed another standing prospective juror, who responded as follows:

THE COURT: Miss [B.], you would be unable to vote to impose the death penalty in this case or any case, regardless of the evidence, because of your feelings about the death penalty?
PROSPECTIVE JUROR [B.]: Yes.
THE COURT: You are excused.

(2RT 1284.)

THE COURT: Mr. [E. N.], you would be unable to vote to impose the death penalty in this case or any case, regardless of the evidence, because of your feelings about the death penalty?
PROSPECTIVE JUROR [N.]: That is correct.
THE COURT: You are excused, as well.

(2RT 1284.)

PROSPECTIVE JUROR [S.]: [J. S.]
THE COURT: And your answer would be the same, Miss [S.]?
PROSPECTIVE JUROR [S.]: Yes.
THE COURT: You would be unable to vote to impose the punishment of death in this case or any case, regardless of the evidence, because of your feelings about the death penalty in general?
PROSPECTIVE JUROR [S.]: Yes.
THE COURT: You are excused, as well.

(2RT 1284-1285.)

THE COURT: In the back row?
PROSPECTIVE JUROR [J.]: [M. J.]
THE COURT: Miss [J.], would your answer be the same?
PROSPECTIVE JUROR [J.]: Yes, it would.
THE COURT: You would be unable to – you would be unwilling, I should say, to vote to impose the punishment of death in this case or any case, regardless of the evidence, because of your feelings about the death penalty in general?
PROSPECTIVE JUROR [J.]: That is correct.
THE COURT: You are excused.

(2RT 1285.) Then the court questioned and excused the sixth and final prospective juror from the second panel, as follows:

> THE COURT: And your name?
> PROSPECTIVE JUROR [E.]: [L. E.].
> THE COURT: Miss [E.], you would be unwilling to vote to impose the punishment of death in this case or any case, regardless of the evidence, because of your feelings about the death penalty, in general?
> PROSPECTIVE JUROR [E.]: Yes, sir.
> THE COURT: You are excused, as well.

(2RT 1285.)

Next, the trial court inquired whether any panel member would be unable to vote for life without the possibility of parole. No juror responded in the affirmative, and the proceedings continued. (2RT 1286.) The trial court then described the eight-page juror questionnaire, provided it to the jurors, and instructed them to instructed to complete and return later that afternoon. (2RT 1286-1287, 1289.)

After the second panel was excused to prepare written questionnaires, the parties memorialized for the record that an in-chambers conference had occurred concerning jury selection. (2RT 1287.) The trial court also denied appellant's motion for sequestered voir dire. (2RT 1288.)

3. Voir Dire Of The First Panel Of Jurors

The first panel of jurors who had not been excused for cause submitted completed written questionnaires. (2RT 1291.) Out of the jurors' presence, the trial court outlined the procedure that would be followed to question the jurors, which would permit both counsel to question individual jurors and make death-qualification challenges for cause. (2RT 1292.) Appellant waived his right to be present during the exercise of challenges for cause regarding the death penalty. (2RT 1293-1294.)

Then, the trial court called 14 jurors from the first panel into the jury box (2RT 1295-1296), and reviewed general legal principles applicable to the

case, including that the defendant is presumed innocent (2RT 1298), read the penalty instructions regarding aggravating and mitigating evidence (2RT 1299-1302), asked whether the jurors would and could comply with instructions (2RT 1303), asked whether the jurors could and would weigh aggravating and mitigating factors (2RT 1303), and would, if appropriate, be able to select the death penalty (2RT 1304).

The trial court next asked two of the individual jurors about answers provided on questionnaires. (2RT 1305-1309.) Appellant's counsel addressed questions to individual jurors (2RT 1309-1319), and the prosecutor questioned the jurors in the same manner (2RT 1319-1339). Appellant declined to challenge any prospective juror for cause. The prosecutor sought to excuse one prospective juror for cause, but the court denied the motion. (2RT 1341.) The first 14 jurors were then excused until Wednesday. (2RT 1341-1342.)

The court questioned the remaining prospective jurors from the first panel by referring to questions discussed with the first group of 14. (2RT 1342-1345.) The court then questioned Prospective Juror No. 2361 concerning his answers on the questionnaire. (2RT 1345-1347.) Next, defense counsel questioned the jurors (2RT 1347-1348), and the prosecutor questioned the jurors individually (2RT 1348-1356). The defense made no challenges for cause. The prosecution challenged Prospective Juror No. 2361 for cause. (2RT 1357.) The trial court upheld the challenge to Prospective Juror No. 2361. The trial court excused the remaining jurors until Wednesday. (2RT 1358.)

4. Voir Dire Of The Second Panel Of Jurors

Late on the afternoon of October 10, 1997, the members of the second panel of jurors entered the courtroom and voir dire began. Initially, 12 prospective jurors were called into the jury box. (2RT 1359-1361.) The court

provided the jurors general instructions and collectively questioned them–no individual juror was specifically addressed through these questions. (2RT 1361-1368.) Defense counsel individually questioned five of the prospective jurors. (2RT 1368-1377.) The court and counsel then engaged in a discussion at the bench concerning one prospective juror and an anticipated defense challenge to her for cause. (2RT 1377.) The prosecutor was afforded an opportunity to question her for rehabilitative purposes (2RT 1378-1379); the trial court excused the remainder of the panel, with the exception of this juror (2RT 1379). After the trial court and the parties questioned this juror in the absence of the other jurors (2RT 1380-1383), the defense challenge for cause was upheld. (2RT 1384-1386.)

After the third panel of prospective jurors was screened, the prosecutor's questioning of the second panel resumed. (2RT 1403-1421.) One prospective juror was excused by stipulation on the basis that service would pose a financial hardship. (2RT 1421.) The trial court sustained the prosecutor's challenge for cause to Prospective Juror F.P. after further questioning by appellant's counsel and the court. (2RT 1422-1424.) The trial court collectively reviewed the instructions and obligations of the jurors with the remaining members of the second panel (2RT 1425), appellant's counsel questioned the panel members collectively and individually (2RT 1428-1433), and the prosecutor questioned the panel members collectively and individually (2RT 1433-1444). Neither party challenged any remaining panel member for cause. (2RT 1444.)

5. Screening Of The Third Panel Of Prospective Jurors

A third panel of jurors was summoned on October 14, 1997, and screened prior to the resumption of the voir dire process for the second panel. (2RT 1388-1389.) Six jurors were excused on the basis that service would pose a financial hardship. (2RT 1390-1395.) The court next provided the

remaining panelists a brief overview of the case, including that the case involved a number of felonies, including a charge of first degree murder, that if the jury found appellant guilty of first degree murder and found special circumstances existed, the jury would have to determine whether the penalty should be affixed at death or life without the possibility of parole. The trial court then remarked, "Persons do tend to have strong opinions one way or the other about the death penalty. There is nothing wrong about having such opinions, but I do need to find out a little bit about those opinions at this time." (2RT 1395.)

The trial court continued as follows: "Now, if there are any of you who have such strong feelings about the death penalty law in general that you would be unable to impose the punishment of death in this case or in any case, regardless of the evidence, would you stand, please?' (2RT 1398.) Six prospective jurors stood. The six jurors were individually questioned and five were excused by the court. (2RT 1395-1403.) The trial court first addressed Prospective Juror [J. L.]:

> PROSPECTIVE JUROR [L.]: I am just against the death penalty.
> THE COURT: Regardless of the circumstances of the case?
> PROSPECTIVE JUROR [L.]: Yes, sir.
> THE COURT: Regardless of the evidence?
> PROSPECTIVE JUROR [L.]: Yes, sir.
> THE COURT: There is no possible case that you would vote to impose the death penalty on?
> PROSPECTIVE JUROR [L.]: Yes, sir.
> THE COURT: All right. Sir, you are excused. Thank you.

(2RT 1396.) The trial court next addressed Prospective Juror [G. L.] as follows:

> THE COURT: All right, ma'am.
> PROSPECTIVE JUROR [L.]: I am strongly against the death penalty. I am against it.
> THE COURT: In any case?
> PROSPECTIVE JUROR [L.]: In any case. Life imprisonment, I'm okay; but death, I'm against it.

THE COURT: So you would be unable to vote to impose the death penalty in this case or in any case; is that right?
PROSPECTIVE JUROR [L.]: Yes.
THE COURT: Regardless of the evidence?
PROSPECTIVE JUROR [L.]: Yes, sir.

(2RT 1396-1397.) The court excused Prospective Juror [L.] after appellant's counsel restated his previous objection. (2RT 1397.)

The third person questioned was Juror [L. W.], in a colloquy as follows:

PROSPECTIVE JUROR [W.]: I'm opposed to it because back in '76 my brother was convicted of murder in the first degree.
THE COURT: So you would be unable to impose the punishment of death in this case or any case?
PROSPECTIVE JUROR [W.]: Any case, yes, sir.
THE COURT: Regardless of the evidence or circumstances?
PROSPECTIVE JUROR [W.]: Yes, sir.
THE COURT: Is that right?
PROSPECTIVE JUROR [W.]: Yes, sir.
THE COURT: You could not even conceive of an instance where you would vote to impose the death penalty?
PROSPECTIVE JUROR [W.]: No, no, sir.
THE COURT: Sir, thank you. You are excused.

(2RT 1397-1398.) The trial court turned to the next standing prospective juror:

THE COURT: Your name, ma'am?
PROSPECTIVE JUROR [C.]: My name is [R. C.].
THE COURT: [R. C.]?
PROSPECTIVE JUROR [C.]: Yes. I am against the death penalty.
THE COURT: So you could not vote to impose the death penalty in this case or in any case?
PROSPECTIVE JUROR [C.]: No, sir.
THE COURT: Regardless of the evidence?
PROSPECTIVE JUROR [C.]: No, sir.
THE COURT: Regardless of the circumstances?
PROSPECTIVE JUROR [C.]: No, sir.
THE COURT: You could not even conceive of a case where you would vote to impose the death penalty?
PROSPECTIVE JUROR [C.]: No, sir.
THE COURT: You are excused. Thank you.

(2RT 1398-1399.) The questioning of the standing prospective jurors continued, as follows:

> PROSPECTIVE JUROR [H.]: [N. B.] or [H.]: [N. H.-B.] How is that? [¶] I'm vegetarian. I don't even – I went fly fishing in the summer, and a fish died, and I cried, so no, there is no way I could even consider anything like that.
> THE COURT: Have you given this subject any thought before right now?
> PROSPECTIVE JUROR [H.]: When the fish died, and I cried, it was spontaneous. I realized then that I can't even enjoy fish, so I don't want to be a part of this.
> THE COURT: You couldn't conceive of an instance so terrible that you would vote to impose the death penalty?
> PROSPECTIVE JUROR [H.]: No, not at all.
> THE COURT: So you couldn't vote to impose it in this case or any case?
> PROSPECTIVE JUROR [H.]: Everything has a right to live.
> THE COURT: Regardless of the evidence?
> PROSPECTIVE JUROR [H.]: Regardless.
> THE COURT: Under no circumstances?
> PROSPECTIVE JUROR [H.]: No circumstances.
> THE COURT: You are excused, as well, Miss [H.]. Thank you.

(2RT 1399-1400.) The sixth standing prospective juror, E. S., was questioned by the court but was not excused once her answers demonstrated she might consider death an appropriate punishment for some crimes. (2RT 1400-1401.)

The trial court then inquired whether any panel member would be unable to vote for life without the possibility of parole. No juror responded in the affirmative, and the trial court described the eight-page juror questionnaire and the procedure to follow in completing that document. (2RT 1402-1403.) The jurors were provided the questionnaire and instructed to complete it and return later that afternoon. (2RT 1403.)

Further questioning of the remaining panelists in this group – including questioning of individual prospective jurors by counsel – was conducted and completed in the afternoon. (2RT 1457-1515.)

6. Screening Of The Fourth Panel Of Prospective Jurors

A fourth panel of jurors was summoned on October 14, 1997, and screened prior to the voir dire process of the third panel. Four jurors were excused on the basis that service would pose a financial hardship. (2RT 1446-1449.) The court next provided the remaining panelists a brief overview of the case, including that the case involved a number of felonies, including a charge of first degree murder, and that if the jury found appellant guilty of first degree murder and found special circumstances existed the jury would have to determine whether the penalty should be affixed at death or life without the possibility of parole. (2RT 1449-1450.) The trial court then remarked, "Now, there are persons who have strong feelings about the death penalty in the State of California, and there is nothing wrong with having such opinions, but I need to know what those opinions are." (2RT 1450.)

The trial court continued as follows: "So I'll ask you first if any of you have such strong feelings about the death penalty that you would be unable to vote to impose the punishment of death in this case or in any other case, regardless of the evidence or the circumstances? If your answer to that is yes, if you would stand." (2RT 1450-1451.) Three prospective jurors stood and were individually questioned by the court. (2RT 1451-1453.) As revealed from the questioning quoted below, only one of the three prospective jurors was excused:

> THE COURT: Let's start with you, sir.
> PROSPECTIVE JUROR [B.]: [E. B.].
> THE COURT: Yes, sir?
> PROSPECTIVE JUROR [B.]: I could not participate in a jury that would be asked to impose death in any case.
> THE COURT: So you could not conceive of a case where the death penalty might be appropriate?
> PROSPECTIVE JUROR [B.]: I could conceive – I could conceive of a case, but I don't know that I'd want – I – I don't know that I would want to be part of that case.

THE COURT: Well, I think we're going to need to ask you some more questions about that. [¶] Have a seat.

(2RT 1451.)

THE COURT: What was your name again?
PROSPECTIVE JUROR [M.]: [A. M.]
THE COURT: Yes, there you are. I'm sorry.
PROSPECTIVE JUROR [M.]: I can conceive of someone doing something wrong where people would consider that he deserved death. I don't – I'm against the death penalty.
THE COURT: In general?
PROSPECTIVE JUROR [M.]: Flat out.
THE COURT: So you could not conceive of a case where the death penalty might be warranted?
PROSPECTIVE JUROR [M.]: My heart is racing just thinking about deciding to make that judgment.
THE COURT: So are you indicating to me then that you could not vote to impose the death penalty in this case or in any other case, regardless of the evidence or circumstances?
PROSPECTIVE JUROR [M.]: No. [¶] Life imprisonment without the possibility of parole; death, no.
THE COURT: So your answer to my question is you could not vote to do that?
PROSPECTIVE JUROR [M.]: I could not vote for the death penalty.
THE COURT: Under any circumstances?
PROSPECTIVE JUROR [M.]: Under any circumstances.
THE COURT: Appreciate your letting me know that, Miss [M.]. You are excused. Thank you.

(2RT 1451-1452.)

PROSPECTIVE JUROR [T.]: [L. T.].
THE COURT: Yes.
PROSPECTIVE JUROR [T.]: I would not like to be the one to decide on taking a person's life.
THE COURT: Well, you wouldn't be the only one. It would be twelve jurors who would have to agree.
PROSPECTIVE JUROR [T.]: I --
THE COURT: So you would not want to participate?
PROSPECTIVE JUROR [T.]: No.
THE COURT: Could you conceive of a case that would be so horrendous that you would vote to impose the death penalty?
PROSPECTIVE JUROR [T.]: Yes.

THE COURT: So depending on the circumstances or the evidence, you might be willing to vote to impose it?
PROSPECTIVE JUROR [T.]: Yes.
THE COURT: Have a seat.

(2RT 1452-1453.)

The trial court then described the eight-page juror questionnaire and provided instructions for completing it. (2RT 1453-1454.) The jurors were given the questionnaire and instructed to complete it and return later that afternoon. (2RT 1454.) Further questioning of the remaining panelists – including questioning of individual prospective jurors by counsel – was conducted and completed in the afternoon. (2RT 1517-1559.)

B. Applicable Law

Decisions of the United States Supreme Court and this Court establish that a prospective juror may be challenged for cause based upon his or her views regarding capital punishment if those views would "prevent or substantially impair" the performance of the juror's duties as defined by the trial court's instructions and the juror's oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *Witherspoon v. Illinois* (1968) 391 U.S. 510, 516, fn. 9 & 522, fn. 21; *People v. Chatman* (2006) 38 Cal.4th 344, 365; *People v. Stewart* (2004) 33 Cal.4th 425, 440-441; *People v. Crittenden* (1994) 9 Cal.4th 83, 121.) A prospective juror is properly excluded if he or she is unable to conscientiously consider all the sentencing alternatives, including the death penalty, where appropriate. (*People v. Cunningham* (2001) 25 Cal.4th 926, 975.) Thus, a prospective juror who has expressed an unwillingness to impose the death penalty may properly be excused for cause. (*People v. Jenkins* (2000) 22 Cal.4th 900, 986-987.) Before granting a challenge for cause concerning a prospective juror over the objection of another party, a trial court must have sufficient information regarding the prospective juror's

state of mind to permit a reliable determination as to whether the juror's views would prevent or substantially impair the performance of his or her duties in the case before the juror. (*People v. Ochoa* (2001) 26 Cal.4th 398, 431.)

There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; *People v. Jones* (2003) 29 Cal.4th 1229, 1246.) "Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1147.) The excusal of jurors who are "unable or unwilling to vote for the death penalty under any circumstances" does not violate a defendant's constitutional right to an impartial jury. (*People v. Avena* (1996) 13 Cal.4th 394, 412.)

A reviewing court will uphold the trial court's ruling if it is fairly supported by the record and accept the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 365; *People v. Smith* (2003) 30 Cal.4th 581, 601-602; see also *People v. Heard* (2003) 31 Cal.4th 946, 958.) In according deference to trial court rulings on motions to exclude for cause, appellate courts recognize that a trial judge who observes and speaks with a prospective juror -- thereby hearing the person's tone of voice and perceiving his or her apparent level of confidence and demeanor -- gleans valuable information that simply does not appear on the record. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 451.)

Where, in the absence of adequate justification, a trial court erroneously excuses a juror for cause based upon the juror's ostensible views regarding the death penalty, controlling United States Supreme Court precedent establishes that, under federal constitutional principles, this type of

error must be considered reversible per se with regard to any ensuing death penalty judgment. (*People v. Heard, supra*, 31 Cal.4th at p. 951; see *Gray v. Mississippi* (1987) 481 U.S. 648, 664-666, 668; *Davis v. Georgia* (1976) 429 U.S. 122, 123.)

C. Appellant's Challenge To The Adequacy Of The Court's Questioning Has Been Waived

Initially, this claim has been waived by appellant's failure to state a timely and specific objection to the adequacy of the court's questioning in the trial court. Indeed, the information available from the appellate record suggests that, prior to the beginning of jury selection, counsel was apprised of and agreed to the procedure the court employed. (2RT 1287.)

Moreover, although appellant's counsel filed a perfunctory pretrial motion invoking the trial court's statutory discretion to permit sequestered and individual voir dire (see 3CT 683-686) and asked that the court not remove these 22 prospective jurors for cause from the venire ("Your Honor, for purpose of the record, we ask that the jurors not be excused, object to their being excused, and ask in the alternative that they be allowed to participate in a pool of jurors that determine the guilt phase, at least, of the trial"), appellant did not articulate a constitutional basis for his objection and never professed any dissatisfaction with the *inquiry* made by the court prior to the excusal for cause of these 22 prospective jurors and, instead, noted that the death qualification had been "accomplished" by the procedure used. (2RT 1287-1288). Indeed, appellant now characterizes his objection as a general challenge to California's death-qualification procedure rather than a claim the court obtained insufficient information to excuse the jurors for cause. (See AOB 32, fn. 20; 81-95.) Thus, appellant has waived the claim by failing to object to the adequacy of the questioning in the trial court. (*People v. Hernandez* (2003) 30 Cal.4th 835, 855 [claim trial court failed to adequately

question prospective jurors on their attitudes toward the death penalty waived because no objection made on this ground at trial].)

D. The Trial Court Properly Excused For Cause Prospective Jurors Who Unequivocally Stated They Would Be Unable Or Unwilling To Vote For The Death Penalty Regardless Of The Evidence Or Circumstances

In this case, 22 prospective jurors were excused by the court for cause without individualized questioning by counsel and prior to the completion of the written questionnaires. Each of the 22 excused prospective jurors unequivocally stated that they would be *unable*[15] to vote to impose a punishment of death regardless of the evidence or circumstances presented to them. (2RT 1267-1271, 1283-1285, 1396-1400, 1451-1453.) Appellant maintains that the trial court's questioning was inadequate to determine whether these prospective jurors could follow the law and the trial court's instructions, and that the trial court's findings to the contrary are not supported by substantial evidence. (AOB 38-57.) He complains that the 22 excused prospective jurors were not apprised of the governing legal principles and were never asked about their ability to consider both aggravating and mitigating evidence. (AOB 45.)

The question here is not whether another procedure could have been employed to investigate the views held by the 22 prospective jurors who were excused for cause before written questionnaires were completed. Rather, the question is whether the excusals were constitutionally adequate. The United States Supreme Court has said that "determinations of juror bias cannot be

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15. All of the 22 prospective jurors stood in response to the court's inquiry whether any juror would be "unable" to vote to impose the punishment of death. Three of the 22 excused prospective jurors, A.S., M.J., and L.E. were individually asked whether they were "unwilling" to vote for a punishment of death. (2RT 1271, 1285.)

reduced to question-and-answer sessions which obtain results in the manner of a catechism." (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.) Similarly, the prior decisions of this Court demonstrate that neither the mode of questioning -- written or oral -- or the number of questions posed is determinative. For instance, this Court has previously held that a prospective juror may be discharged for cause based solely on his or her questions on a written questionnaire, so long as the answers clearly demonstrate that the prospective juror is unwilling to temporarily set aside his or her own beliefs and follow the law. (*People v. Avila* (2006) 38 Cal.4th 491, 531.) Here, given these jurors' unequivocal representations that they would be unable or unwilling to vote for a punishment of death regardless of the evidence presented, the excusal of these 22 prospective jurors for cause did not violate constitutional principles.

Appellant complains that "the trial court failed to conduct an adequate inquiry using the proper legal standard." (AOB 47.) However, the court's questioning was substantially similar to the questioning examined by the Supreme Court in *Darden v. Wainwright* (1986) 477 U.S. 168, and the questioning articulated the standard ("unable or unwilling") previously referenced by this Court in *People v. Avena, supra*, 13 Cal.4th at p. 412, and *People v. Miranda* (1987) 44 Cal.3d 57, 96.

In *Darden v. Wainwright, supra*, 477 U.S. 168, the Supreme Court upheld the excusal of a juror for cause based upon the answer to a single oral death-qualification question: "'Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?'" (*Id.* at pp. 175-176.) The juror was excused after he responded, "Yes, I have." (*Id.* at p. 178.) In reviewing the excusal, the Court observed that the question and

answer did not, necessarily, compel a conclusion that the juror "could not under any circumstance recommend the death penalty." (*Id.* at p. 178.) However, the Court in making its assessment of "substantial impairment" observed that "[t]he trial court, 'aided as it undoubtedly was by its assessment of [the potential juror's] demeanor,'" "could take account of the fact that [the prospective juror] was present throughout an entire series of questions [posed orally by the court to other prospective jurors] that made the purpose and meaning of the *Witt* inquiry absolutely clear." (*Ibid.*, citation omitted.) In addition, the Court observed, "[n]o specific objection was made to the excusal of [the prospective juror] by defense counsel...." (*Ibid.*)

In this case, although appellant's counsel asked that all prospective jurors be retained in the venire, counsel did not object on the basis that any individual juror's responses were insufficient to find cause to excuse him or her. Moreover, the trial court had the opportunity to assess the demeanor of the individual jurors, each of the jurors heard the question a minimum of two times, the jurors were individually questioned concerning their responses, and the trial court asked additional questions for clarification when it deemed necessary. The trial court's ruling that the 22 excused jurors' views of capital punishment would "prevent or substantially impair" the performance of the juror's duties is supported by the record and should be upheld.

To the extent appellant implies that the trial court baffled the prospective jurors with a "single ill-phrased question" (AOB 30), the record refutes this implication. Each juror was individually and directly asked a minimum of two questions that either incorporated the initial question posed to the jurors as a group or incorporated portions of prior inquiries. Although the court asked more questions of some jurors and fewer of others, the presumptive explanation for the differences in questioning lies in the demeanor of the jurors and the tone of their responses. The trial court

conducted further inquiry of prospective jurors who provided equivocal answers and retained three prospective jurors whose answers remained equivocal following the additional questioning. (2RT 1400-1401, 1451-1453.) Neither appellant's counsel nor the prosecutor requested that the court make additional inquiry of the 22 prospective jurors who were excused. Nor did either counsel suggest that there was insufficient evidence for the court to conclude that, for these 22 excused prospective jurors, their "views on capital punishment . . . would 'prevent or substantially impair the performance of [the juror's] duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) Appellant's challenge to the procedure employed by the trial court should fail.

Appellant compares the questioning in this case to questioning in cases this Court has found juror excusals were not supported by the record. (See AOB 30, 40-45, citing *People v. Stewart*, *supra*, 33 Cal.4th 425, and *People v. Heard*, *supra*, 31 Cal.4th 946.) Those cases are distinguishable.

First, appellant's case is not similar to the circumstances presented in *People v. Stewart*, *supra*, 33 Cal.4th 425. (AOB 40-42.) There, this Court concluded the trial court had erred in excusing five prospective jurors for cause, over defense objection, based solely upon their checked responses and written answers on a questionnaire. (*Id.* at pp. 454-455.) In *Stewart*, the excused jurors had affirmatively answered a written question that inquired whether their views would "prevent or make it very difficult for you" to vote to impose the death penalty, and the court conducted no additional questioning. (*Id.* at pp. 444-445.) This Court concluded, "a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled–indeed, duty bound–to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*Id.* at pp. 446-447.) Here, the court's question

contained no ambiguity; rather, by standing, the excused jurors affirmatively represented they would be *unable* to impose the death penalty *under any circumstances*. These excused jurors professed more than hesitation about voting for the death penalty. The court subsequently clarified this physical response individually with each juror and refused to excuse those jurors who equivocated in their answers. Whether the excused jurors were individually asked if they would be *unable* or *unwilling* to vote for the death penalty, all professed views of capital punishment that would "prevent or substantially impair" the performance of their duties as jurors.

Appellant's comparison of his case to *People v. Heard*, *supra*, 31 Cal.4th 946, also fails. (AOB 42-45.) In *Heard*, a juror indicated in his written questionnaire that he considered life in prison to be "worse" than the death penalty. Subsequently, the juror was questioned at length by the court and the parties. After the court explained to the juror that California law considered death to be the worse punishment, the juror stated he would follow the law. This Court concluded that the juror's statement on the written questionnaire was not sufficient to support the excusal for cause because it had been "given without the benefit of the trial court's explanation of the governing legal principles." (*Id.* at p. 964.)

Although appellant suggests that the prospective jurors may not have understood the import of the questions posed by the court – referencing one juror's explanation that she was a vegetarian[16] (AOB 48-49), the absence of

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16. The full context of this response demonstrates the juror fully comprehended the meaning of the court's question:

> PROSPECTIVE JUROR [H.]: I'm vegetarian. I don't even – I went fly fishing in the summer, and a fish died, and I cried, so no, there is no way I could even consider anything like that.
> THE COURT: Have you given this subject any thought before right now?
> PROSPECTIVE JUROR [H.]: When the fish died, and I cried,

an objection to the inquiry conducted and the explanations volunteered by some prospective jurors together belie this claim. The answers provided by the excused jurors were unequivocal. That some prospective jurors felt compelled to volunteer additional information does not evidence a lack of understanding of the inquiry. The trial court had the opportunity to assess the demeanor of the individual excused jurors and could best gauge the persistence of the view expressed by the excused jurors. The trial court's ruling that the 22 excused jurors' views of capital punishment would "prevent or substantially impair" the performance of the juror's duties is supported by the record and should be upheld.

E. Should This Court Conclude That The Trial Court Did Not Adequately Question The 22 Prospective Jurors Who Were Excused Based Upon Their Views Of The Death Penalty, The Appropriate Remedy Would Be To Remand For A New Penalty Phase

Should this Court conclude that the trial court did not adequately question the 22 prospective jurors who were excused based upon their views of the death penalty, the applicable federal decisions require reversal of the judgment as to the sentence of death only; remand for a new penalty phase

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> it was spontaneous. I realized then that I can't even enjoy fish, so I don't want to be a part of this.
> THE COURT: You couldn't conceive of an instance so terrible that you would vote to impose the death penalty?
> PROSPECTIVE JUROR [H.]: No, not at all.
> THE COURT: So you couldn't vote to impose it in this case or any case?
> PROSPECTIVE JUROR [H.]: Everything has a right to live.
> [¶] THE COURT: Regardless of the evidence?
> PROSPECTIVE JUROR [H.]: Regardless.
> THE COURT: Under no circumstances?
> PROSPECTIVE JUROR [H.]: No circumstances.
> THE COURT: You are excused, as well, Miss [H.]. Thank you.

(2RT 1399-1400.)

judgment as to the sentence of death only; remand for a new penalty phase before a properly selected jury is permissible and should be granted. (*People v. Heard*, *supra*, 31 Cal.4th at p. 966.)

II.

THE TRIAL COURT PROPERLY EXCUSED PROSPECTIVE JUROR NO. 2361 FOR CAUSE BASED UPON HIS VIEWS OF THE DEATH PENALTY

In his second argument, appellant contends that the trial court erroneously excused Prospective Juror No. 2361[17] for cause, requiring reversal of his conviction and judgment. (AOB 61-71.) Despite his oral vacillations and self-contradictions, Prospective Juror No. 2361 consistently stated a firmly-held belief the death penalty should not be utilized as a penalty. A review of the record reveals substantial evidence supports the trial court's ruling. The trial court, therefore, acted well within its broad discretion in excusing Prospective Juror No. 2361 for cause.

A. The Jury Questionnaire

After the jurors were screened for hardship and questioned whether they would be unable, in this or any case, to impose the death penalty (see Argument I, *ante*) and questioned whether they would, in this or any case, be unable to impose a sentence of life without the possibility of parole, the jurors were provided an eight-page questionnaire to complete. (3CT 830-837 [blank questionnaire].) The questionnaire included the following introductory instructions:

> The following questions concern your feelings about the death penalty. These questions about the death penalty are asked because one of the possible sentences for a person convicted of the charges in this case is the death penalty. It is therefore important for the Court to know whether you can be fair to both the prosecution and the defense on the issue of the death penalty if you reach that issue.
>
> The trial of a defendant charged with an offense which is punishable by the death penalty is divided in to two possible trials: the

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17. The appellate record reflects that Prospective Juror Richard B. was identified as Prospective Juror No. 2361. (2RT 1342.)

guilt phase and the penalty phase. In the first trial or guilt phase, the jury must decide (1) whether or not the defendant is guilty of first-degree murder and (2) whether or not the "special circumstance" is true. In this case, the special circumstance alleged is "felony-murder." A felony-murder occurs when a murder is committed during the commission of certain other felonies. In this case, it is alleged that the murder occurred during commission of a burglary and a robbery.

If the jury finds a defendant guilty of first-degree murder and finds the special circumstance to be true, the second trial or penalty phase occurs. During the penalty phase, the jury must decide which of two possible punishments is appropriate. The only possible punishments are (1) the death penalty or (2) life imprisonment without the possibility of parole. The jury makes this decision between these two penalties based upon additional evidence that is relevant to the penalty decision. This additional evidence may include circumstances relating to the crimes and the background of the defendant.

(3CT 831; 4CT 852 [No. 2361's questionnaire].)

In his questionnaire (4CT 852-855), Prospective Juror No. 2361 provided the following underlined responses:

2. Do you understand that if this trial court reaches a penalty phase, one of the two possible choices is the death penalty? No. 3. Do you understand that if this trial court reaches a penalty phase, the only other choice is life imprisonment without the possibility of parole? Yes.

4. What are your general feelings about the death penalty? I don't believe in death penalty.

5. Do you believe that California should have the death penalty? Please explain your answer. No.

6. Do you believe that the death penalty is used too often or too little? Please explain your answer. No. It should be used.[18/]

7. Do you belong to any group(s) that support either eliminating or increasing use of the death penalty? If yes, please name the group(s) and explain your view. No.

8. Are your views on the death penalty based upon religious principles? If yes, please explain. No.

9. Regardless of your views on the death penalty, would

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18. During individual questioning, the trial court clarified that Prospective Juror No. 2361 intended the response to Question 6 to read, "No, it should *not* be used." (2RT 1345, italics added.)

you, as a juror, be able to vote to impose the death penalty on another person if you believed, after hearing all of the evidence, that the penalty was appropriate? Please explain your answer. No.

10. What do you believe the purpose of the death penalty to be? I don't believe in death penalty.

(4CT 852-854.)

Prospective Juror No. 2361 circled "Disagree" as the response to the statement, "Anyone who kills another person during the commission of a robbery or burglary should automatically receive the death penalty." (4CT 854.) Prospective Juror No. 2361 underlined "Agreed" as the response to the statement, "Anyone who kills another person during the commission of a robbery or burglary should automatically receive life imprisonment without the possibility of parole." (4CT 854.) Prospective Juror No. 2361 circled "Yes" as the response to the question, "If a defendant were charged with first-degree murder and the special circumstance of murder committed during a robbery or burglary, would you refuse to find the defendant guilty of first-degree murder, regardless of the evidence, in order to avoid the issue of the death penalty?" (4CT 854.) Prospective Juror No. 2361 circled "No" as the response to the question, "If you found the defendant guilty of first-degree murder, would you refuse to find the special circumstance true, regardless of the evidence, in order to avoid the issue of the death penalty?" (4CT 854.)

Prospective Juror No. 2361 circled "No" as the response to the question, "If you found the defendant guilty of first-degree murder, would you find the special circumstance true, regardless of the evidence, in order to be able to consider the issue of the death penalty?" (4CT 855.) Prospective Juror No. 2361 circled "Yes" as the response to the question, "If the trial reached a penalty phase, would you vote to impose life imprisonment without the possibility of parole regardless of the evidence?" (4CT 855.) Prospective Juror No. 2361 circled "No" as the response to the question, "If the trial

reached a penalty phase, would you vote to impose the death penalty regardless of the evidence?" (4CT 855.) Prospective Juror No. 2361 circled "Yes" as the response to the question, "Do you believe that life imprisonment without the possibility of parole is a more severe punishment than the death penalty?" (4CT 855.) Prospective Juror No. 2361 circled "Not sure" as the response to the question, "Do you have any conscientious objections at all to the death penalty which might impair your ability to be fair and impartial to the prosecution in a case in which the prosecution is seeking the death penalty?" (4CT 855.) He circled "No" as the response to the question, "Do you have any feelings at all in favor of the death penalty which are so strong as to impair your ability to be fair and impartial to the defense in a case in which the death penalty is sought?" (4CT 855.) Finally, in response to the question, "In the past ten years, have your views regarding the death penalty changed?" Prospective Juror No. 2361 wrote, "I don't believe in death penalty." (4CT 855.)

B. Voir Dire Of Prospective Juror No. 2361

As discussed in Argument I, *ante*, before the prospective jurors were given the written juror questionnaire (3CT 830-837 [blank copy]), the trial court asked the prospective jurors, as a group, whether any of them would be unable to vote for death: "Now, without knowing anything at all about this case, is there any juror sitting in the audience right now that, regardless of what the evidence might be, has such feelings about the death penalty that he or she would be unable to impose the death penalty in this case?" (2RT 1267.) Ten prospective jurors responded affirmatively. They were questioned individually and excused by the court. (2RT 1267-1271.)[19/] The remaining

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19. The process was repeated for a second group of jurors called into the courtroom, and six prospective jurors responded affirmatively, were individually questioned, and were excused by the court. (2RT 1283-1285.)

jurors, including Prospective Juror No. 2361, were provided the questionnaire and instructed to complete it and return at 1:30 p.m. (2RT 1272, 1289.)

After the prospective jurors, including Prospective Juror No. 2361, completed and submitted the questionnaires (2RT 1291), they were summoned to the courtroom and 14 were seated in the jury box. (2RT 1295-1296.) The court discussed some of the applicable legal principles with the prospective jurors, including that the defendant is presumed innocent. (2RT 1298.) The trial court also read the penalty instructions re aggravating and mitigating evidence (2RT 1299-1302) and asked the jurors collectively whether they could comply with instructions (2RT 1303), whether they could weigh aggravating and mitigating factors (2RT 1303), and whether the jurors would be able to select the death penalty (2RT 1304). One prospective juror (No. 1836), replied that she could not do so. (2RT 1304-1305.)

The court then individually asked two of the prospective jurors questions about the answers each provided on the questionnaires. (2RT 1305-1309.) Individual questioning followed by first appellant's attorney (2RT 1309-1319) then the prosecutor (2RT 1319-1339). The prosecutor challenged Prospective Juror No. 1836 for cause, but the trial court denied the motion. (2RT 1341.)

Prospective Juror No. 2361 was among the next group of prospective jurors who were called from the audience section of the courtroom to be seated in the box and questioned. (2RT 1342.) The trial court questioned this group collectively by referring to questions discussed with the first group. (2RT 1343-1345.)

The trial court then questioned Prospective Juror No. 2361 individually about his answers on the questionnaire. (2RT 1345-1347.) Specifically, as to Question 6 on Prospective Juror No. 2361's questionnaire, the trial court clarified that Prospective Juror No. 2361's response was "No, [the death

penalty] should not be used" rather than the response written on the form ("No, it should be used."). (2RT 1345.) The trial court further inquired of Prospective Juror No. 2361 why he had not answered affirmatively in the morning session when the trial court asked whether anyone would be unable to impose the death penalty. Prospective Juror No. 2361 responded, "When I read the questionnaire outside, that's when I made my mind up. I wasn't sure about it in here, about the death penalty." (2RT 1346.) Thereafter, Prospective Juror No. 2361 equivocated and said he might be able to vote for the death penalty if he felt the evidence warranted it. (2RT 1346-1347.)

Appellant's attorney questioned Prospective Juror No. 2361 individually and solicited the response, "True," to the statement, "I don't like to do it, but I'd do if it if was warranted under the evidence because it's my duty." (2RT 1347.) As to Prospective Juror No. 2361, the prosecutor engaged in the following colloquy:

> [THE PROSECUTOR]: [Prospective Juror No. 2361], as you sit here today, do you believe you could vote to impose death –
> PROSPECTIVE JUROR [No. 2361]: Yes.
> [THE PROSECUTOR]: You could make that vote, if the evidence and the law warranted it, and be okay with your own conscience?
> PROSPECTIVE JUROR [No. 2361]: Yeah, depending on the evidence.
> [THE PROSECUTOR]: I'm sorry?
> PROSPECTIVE JUROR [No. 2361]: Depending on the evidence.
> [THE PROSECUTOR]: Is there a reason why the questionnaire asked you that question, or asked you the question of whether or not you could impose death on someone, despite your personal views, you indicated that you couldn't? [¶] *Have you changed your mind since the questionnaire?*
> PROSPECTIVE JUROR [No. 2361]: *No.*

(2RT 1348-1349, emphasis added.)

The prosecutor challenged Prospective Juror No. 2361 for cause based upon the answers he provided on the questionnaire. Appellant's counsel contested the challenge. (2RT 1357.) The trial court sustained the challenge,

finding that Prospective Juror No. 2361 stated during individual questioning that his views had not changed from the answers on his questionnaire. (2RT 1358.)

C. The Record Supports The Trial Court's Finding Prospective Juror No. 2361's Views Of The Death Penalty Would Substantially Impair The Performance Of His Duties As A Juror

As more fully discussed in Argument I, *ante*, decisions of the United States Supreme Court and this Court establish that a prospective juror may be challenged for cause based upon his or her views regarding capital punishment if those views would "prevent or substantially impair" the performance of the juror's duties as defined by the trial court's instructions and the juror's oath. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 516, fn. 9 & 522, fn. 21; *People v. Chatman*, *supra*, 38 Cal.4th at p. 365; *People v. Schmeck* (2005) 37 Cal.4th 240, 262; *People v. Stewart*, *supra*, 33 Cal.4th at pp. 440-441.) Before granting a challenge for cause concerning a prospective juror over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would prevent or substantially impair the performance of his or her duties in the case before the juror. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 431.) A reviewing court will uphold the trial court's ruling if it is fairly supported by the record; the trial court's determination of the prospective juror's true state of mind is binding when the prospective juror has made statements that are conflicting or ambiguous. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 262; *People v. Chatman*, *supra*, 38 Cal.4th at p. 365; *People v. Smith*, *supra*, 30 Cal.4th at pp. 601-602.)

In this case, substantial evidence supports the trial court's conclusion that Prospective Juror No. 2361's view of capital punishment would "prevent or substantially impair" the performance of his duties; thus, this Court should defer to the trial court's assessment of Prospective Juror No. 2361's equivocal oral statements when confronted about his written answers. On the one hand, Prospective Juror No. 2361 maintained in his written questionnaire that he did not believe in the death penalty, it should not be used, and he would always vote against it. (4CT 852-855.) Yet Prospective Juror No. 2361 also orally claimed he would consider imposing the death penalty "if [he] felt the evidence warranted it." (2RT 1346, 1348-1349.) But Prospective Juror No. 2361 further maintained that he had not "changed his mind since the questionnaire." (2RT 1349.) The waffling answers provided by Prospective Juror No. 2361 when confronted by his contradictions clearly conveyed he would be unable to faithfully and impartially apply the law in this case. Given Prospective Juror No. 2361's vacillation, as well as his belief the death penalty should not be used, the trial court's conclusion that he was unfit as a juror must be upheld. (See *People v. Navarette* (2003) 30 Cal.4th 458, 490 ["When a prospective juror has made conflicting statements regarding his or her ability to remain impartial and apply the law despite strong personal beliefs, we accept as binding the trial court's assessment."]; *People v. Maury* (2003) 30 Cal.4th 342, 377 [because "the potential jurors' statements were equivocal and conflicting regarding their ability to render a death verdict[,] . . . we must defer to the trial court's determination of their states of mind"]; *People v. Jones, supra,* 29 Cal.4th at p. 1247 [excused juror "earlier gave sharply conflicting statements,[] and so the trial court's determination of [his] state of mind, i.e., that [he] would be *substantially impaired* in the performance of his duties as a juror in this case, is binding on us"], original italics; see also *id.* at p. 1249.)

Even if Prospective Juror No. 2361's views about the death penalty were not inconsistent, substantial evidence supports the trial court's finding that he was unfit to serve as a juror. Prospective Juror No. 2361's juror questionnaire and voir dire revealed that he would not impose the death penalty even in the worst cases – and would even go so far as to decline to convict a defendant of first-degree murder to avoid the issue of the death penalty – because he firmly believed it was extreme and contrary to his belief system. (2RT 1349; 4CT 852-855.) Such views substantially impaired his ability to be fair notwithstanding his equivocations to the contrary. (See, e.g., *People v. Maury, supra,* 30 Cal.4th at p. 377 ["because the challenged prospective jurors indicated either that they could not apply the death penalty under any circumstance, or were not prepared to impose the death penalty and were undecided as to their ability to do so, the trial court did not err in excusing them"].) The court therefore properly excused Prospective Juror No. 2361 for cause.

III.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR INDIVIDUAL SEQUESTERED DEATH QUALIFICATION VOIR DIRE

Appellant contends that the trial court erroneously denied his motion for generalized individual, sequestered voir dire concerning death qualification. (AOB 72-80.) As appellant reluctantly acknowledges (AOB 73, fn. 41), individual sequestered voir dire is not constitutionally mandated, and this Court has repeatedly rejected claims to the contrary. Moreover, in this case the trial court did not abuse its discretion when it concluded generalized sequestered voir dire was unnecessary to select the jury for appellant's October 1997 trial. Thus, this claim fails.

A. Relevant Jury Selection Proceedings

On July 16, 1997, appellant filed a three-page motion requesting sequestered voir dire. (3CT 683-686.) The motion argued that the trial court had discretion under Code of Civil Procedure section 223 to permit sequestered, individual voir dire (3CT 684) and that the type of voir dire articulated in *Hovey v. Superior Court, supra*, 28 Cal.3d 1, 80-81, was "the most effective method of preventing prospective jurors from being influenced by others in the responses to the death-qualification aspect of the voir dire process and enabling the parties to discover bias." (3CT 685.)

On the morning of October 8, 1997, counsel made their first appearance before the judge (Hon. Andrew Kauffman) who ultimately presided over the trial. Appellant was not present. The parties informed the court that the only pending pretrial motion was appellant's motion for sequestered death qualification voir dire. Appellant had not waived his presence for the hearing on that motion. (1RT 1011-1012.) The parties

agreed to defer the sequestered voir dire motion until the day jury selection commenced in appellant's case. (1RT 1014.)

Prior to the commencement of jury selection, the parties met with the trial court in chambers[20] "with regard to the procedure to be followed this morning." Both counsel acknowledged that they had agreed to the procedures that had been discussed. (2RT 1287.) The court screened two panels of prospective jurors, excusing some for financial hardship and others for cause based upon their professed inability to vote for the death penalty. (2RT 1248-1285.)

During a break between the second and third panel of prospective jurors, the trial court then turned to the defense motion for sequestered voir dire and addressed it as follows:

> THE COURT: As long as we're meeting in the absence of the prospective jurors, Mr. Lindars, let's take up the motion that you had previously filed, and that would be for the sequestered voir dire.
> MR. LINDARS: Yes.
> THE COURT: Would you like to be heard on your motion?
> MR. LINDARS: Actually, I anticipated that what used to be referred to as the *Witherspoon* questions, or the questions about whether or not they could be impartial on the issue of the death penalty, or whether or not they had such conviction that they would never be able to impose it, would be part of the sequestered voir dire.
>
> So since that's already been accomplished, it's kind of a moot as to that.
> THE COURT: Submit it, Mr. Sortino?
> MR. SORTINO: I join in Mr. Lindar's request and submit it on his pleading.
> THE COURT: You join in his request for sequestered voir dire?
> MR. SORTINO: I don't have a problem with it if he wants to conduct it that way, and the Court wants to conduct it that way. I don't have a problem with it either.
>
> I think we get more candid answers that way, but I know the Court

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20. This in-chambers conference was not reported; it was memorialized on the record after the first group of jurors were called and initial selection procedures commenced. (2RT 1287-1288.)

has discretion to go either way, and I'll submit it on his papers.
THE COURT: Motion will be denied.

(2RT 1287-1288.)

Thereafter, as discussed more fully in Argument I, *ante*, the third and fourth panels of prospective jurors were called, sworn, and questioned. The trial court excused six additional prospective jurors for cause after they stated they would be unable or unwilling to vote to impose a punishment of death regardless of the evidence or circumstances. The remaining 81 jurors completed an eight-page written questionnaire presenting 22 questions focusing upon capital punishment. (2RT 1560; 3CT 830-837 [blank questionnaire].) The prospective jurors who completed written questionnaires were questioned in the presence of other jurors by the court, defense counsel, and the prosecutor in the presence of the other panel members and were subject to challenges for cause. (2RT 1291-1560, 3RT 1561-1618.)

B. Sequestered, Individual Voir Dire Is Not Constitutionally Compelled

Initially, appellant claims that a voir dire procedure that does not permit individual sequestered voir dire concerning death-qualification is constitutionally inadequate. (AOB 73-76.) In *Hovey v. Superior Court*, *supra*, 28 Cal.3d 1, this Court invoked its "supervisory authority over California criminal procedure" and articulated a rule of sequestration for the qualification of jurors to serve on death penalty juries. (*Id.* at p. 80.) Code of Civil Procedure section 223, which became effective as part of Proposition 115 on June 6, 1990 (see *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 299-300), provided at the time of appellant's 1997 trial that the voir dire of prospective jurors in capital cases "shall, where practicable, occur in the presence of the other jurors." (Code Civ. Proc., § 223.) As this Court has previously observed, "This provision had the intent and effect of abrogating the sequestration rule of *Hovey, supra,* 28 Cal.3d 1, 168 Cal.Rptr. 128, 616

P.2d 1301, which was not constitutionally compelled. [Citations.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 533, 537 fn.9.)

Appellant acknowledges, in a footnote, that this Court has repeatedly rejected similar claims and states that he includes this claim to "ensure federal review." (AOB 73, fn. 41, citing *People v. Jurado* (2006) 38 Cal.4th 72, 101; *People v. Stitely*, *supra*, 35 Cal.4th at pp. 536-537; *People v. Box* (2000) 23 Cal.4th 1153, 1180.) Appellant offers no persuasive reason for this Court to revisit its longstanding rejection of such claims; the instant claim should, therefore, be similarly rejected.

C. The Trial Court Was Not Required To Affirmatively Acknowledge Its Discretion To Permit Sequestered Voir Dire

Second, appellant contends that the record fails to demonstrate that the trial court was aware of, and exercised, its discretion under Code of Civil Procedure section 223[21] to permit individual sequestered voir dire and that the

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21. At the time of appellant's trial in 1997, Code of Civil Procedure section 223 provided as follows:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.
>
> Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.
>
> The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

(Added by Prop. 115, approved by voters, Primary Elec. (June 5, 1990).)

voir dire conducted in the presence of other jurors violated his federal constitutional rights to due process and equal protection under the "liberty interest" principle (referencing *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346). (AOB 76-78.) In support of his claim, appellant notes that the trial court did not "explain" his denial of appellant's motion for sequestered voir dire. (AOB 77.) He is mistaken.

Here, it is clear the trial court was aware of the provisions of Proposition 115 and the court's discretion to conduct voir dire. Nothing in the record suggests that the trial court believed it lacked discretion to permit individual, sequestered voir dire. Rather, the record includes at least two explicit references to the court's discretion: the first in the text of appellant's motion for individual, sequestered voir dire, which expressly referenced Code of Civil Procedure section 223 (3CT 684), and the second by the prosecutor, who stated during discussion of the motion that he was aware that the trial court had discretion not to permit sequestered voir dire (2RT 1288).

Nothing in Code of Civil Procedure section 223 required the trial court to provide a statement of reasons for following the statutory preference of non-sequestered voir dire. Typically, a statement of reasons is required where a trial court contravenes the statutory presumption. Indeed, the cases referenced by appellant illustrate this pattern. (See AOB 77-78, referencing *People v. Romero* (1996) 13 Cal.4th 497, 532 [remand required where trial court struck prior conviction without stating reasons as required by section 1385(a)]; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977 [record must reflect records for exercising discretion to reduce felony to misdemeanor under section 17(b)].) Nor can appellant find assistance in cases where trial courts provided reasons that could be examined on appeal (see AOB 77-78, citing *People v. Waidla* (2000) 22 Cal.4th 690, 713-714 [stated reasons not unreasonable]; *People v. Bigelow* (1984) 37 Cal.3d 731, 743 [trial

court erroneously ruled that California law does not permit appointment of advisory counsel]; *Ex Parte Brumback* (1956) 46 Cal.2d 810, 813 [trial court erroneously stated lacked discretion to authorize bail on appeal]; *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1183 [trial court's comments reflected belief it lacked discretion to permit sequestered voir dire]; *People v. Downey* (2000) 82 Cal.App.4th 899, 912 [trial court erroneously stated sentence required to be consecutive].) And no California court has held that a statement of reasons is required where a court denies a request for sequestered voir dire. (See, e.g., *People v. Green* (1980) 27 Cal.3d 1, 24-26 [referencing prior decisions requiring weighing of prejudicial effect against probative value be apparent from record].)

As noted above, sequestered voir dire is not constitutionally mandated. (See Part B, *ante*.) Code of Civil Procedure section 223 expressly states a presumption in favor of voir dire conducted in the presence of the other jurors. The trial court properly exercised its discretion and did not err in declining to provide reasons for its denial of appellant's motion for *Hovey* voir dire.

D. The Trial Court Did Not Abuse Its Discretion In Denying Appellant's Motion For Sequestered Voir Dire

Third, appellant contends that the trial court abused its discretion under Code of Civil Procedure section 223 by denying the defense request for individual sequestered voir dire and that this abuse of discretion resulted in a violation of his federal constitutional rights to due process and equal protection under the "liberty interest" principle since the procedures used were inadequate to identify partial or unqualified jurors. (AOB 78-80.) Citing language from this Court's decision in *Hovey*, appellant claims that the group voir dire procedure "created a substantial risk that [appellant] was tried by jurors who were not forthright and revealing of their true feelings and attitudes toward the death penalty and were 'desensitized' to the duty to

determine the penalty to be imposed." (AOB 79). He argues that the error must be evaluated under the federal constitutional standard–whether it was harmless beyond a reasonable doubt – to determine the impact of the error and that the exposure of jurors to death-qualification of other jurors cannot be found harmless. (AOB 78, 80.) Again, appellant is mistaken.

An appellate court reviews a trial court's grant or denial of a motion concerning the conduct of the voir dire of prospective jurors for abuse of discretion. (See Code Civ. Proc., § 223.) A trial court abuses its discretion when its ruling falls "outside the bounds of reason." (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 408 [internal quotation marks omitted].)

Appellant provides no "specific example of how questioning prospective jurors in the presence of other jurors prevented him from uncovering juror bias." (*People v. Stitely*, supra, 35 Cal.4th at p. 537.) The court permitted him to individually question the prospective jurors who completed the written questionnaire concerning their views of capital punishment; counsel did not seek to address any topic that was refused. Indeed, based upon this questioning and the 22-question written questionnaire, appellant's counsel successfully challenged three prospective jurors for cause on this basis. (2RT 1384-1385, 1498, 1548-1550.) And no circumstance arose during the jury selection that prompted either party to seek sequestered voir dire of an individual juror. Appellant's claims should be rejected.

IV.

THE SELECTION OF A DEATH-QUALIFIED JURY IS CONSTITUTIONAL

Once jury selection had begun, appellant's counsel orally requested that the 22 prospective jurors who were excused for cause prior to completing the juror questionnaires because of their stated inability to vote for the punishment of death be permitted to remain in the pool of jurors from which his jury would be selected. The trial court denied this request. (2RT 1268.) Appellant references this denial as an objection to California's death-qualification procedures and claims that the procedures utilized to select California capital juries, including appellant's jury, resulted in a jury predisposed to convict him and violated his Sixth and Fourteenth Amendment right to a trial by an impartial jury as well as his Eighth and Fourteenth Amendment right to a reliable death sentence. He claims these violations require reversal of his convictions and penalty judgment. (AOB 81-95; see also AOB 32, fn. 20.) This claim is not preserved for appeal and otherwise lacks merit.

Initially, the federal constitutional claims now raised by appellant have been waived by appellant's failure to state a timely and specific objection on federal constitutional grounds in the trial court. (2RT 1268.) Appellant articulated no statutory or constitutional basis for his objection in the trial court, and his written motion concerning jury selection invoked merely the trial court's statutory discretion to permit sequestered and individual voir dire. (3CT 683-686.) Appellant has waived the issue by failing to raise it in the trial court. (See generally *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1000.)

In essence, appellant argues that this Court was correct when it observed in *Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 74-75, that exposure to the death-qualification process created a substantial risk that

jurors would be more likely to sentence a defendant to death and asks this Court to reinstate that holding. (AOB 83-86.) As appellant acknowledges (AOB 82), both this Court and the United States Supreme Court have rejected his assertions. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176 [death qualification does not violate Sixth or Fourteenth Amendments]; *People v. Jurado*, *supra*, 38 Cal.4th at p. 101; *People v. Carter* (2005) 36 Cal.4th 1215, 1247-1248 [individual, sequestered voir dire not required by Constitution]; *People v. Lenart* (2004) 32 Cal.4th 1107, 1120; *People v. Jackson* (1996) 13 Cal.4th 1164, 1198-1199 ["social science evidence" offered by the defendant to show "that death-qualified juries are more prone to convict than those not thus qualified" did not support a constitutional prohibition of death qualification].)

These contentions have previously been rejected by this Court and should be rejected again as appellant has not offered any new or persuasive reason to revisit its longstanding rejection of such claims.

V.

THE TRIAL COURT'S EVIDENTIARY RULINGS CONCERNING IMPEACHMENT OF PROSECUTION WITNESS GLADYS SANTOS DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS, AND, IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant contends that the trial court prejudicially restricted the cross-examination of prosecution witness Gladys Santos on matters relevant to her credibility, thereby violating his rights to due process, a fair trial, to confront witnesses, and to a reliable penalty determination as guaranteed by the state and federal Constitutions. (AOB 96-120.) Specifically, appellant contests the trial court's rulings regarding the following areas of inquiry: (1) the conduct underlying Santos's two misdemeanor petty theft convictions (AOB 96, 103-105); (2) whether Santos "had a practice of supplying methamphetamine on a barter system in exchange for stolen property" and "her concerns about child custody and public assistance as those areas were directly related to Santos's willingness to testify truthfully regarding her own activities as a drug supplier" (AOB 97, 105-106); and (3) the prosecutor's contacts with the Department of Children and Family Services on Santos's behalf (AOB 106).

Appellant did not preserve his arguments on the second and third points for appeal and, therefore, they are waived. Nor has appellant shown that any of the excluded evidence now cast as "restrictions" on cross-examination would have cast Santos in a more negative light than her testimony itself created, produced a significantly different impression of Santos's testimony, or precluded a defense theory. In any event, because any error was harmless under either the state or federal constitutional standard of prejudice, this claim fails.

A. Summary Of Relevant Trial Proceedings

During trial, a hearing was held to address issues relating to the testimony of prosecution witness Gladys Santos, including matters concerning impeachment and statements made to her by appellant and Drebert. (5RT 2412-2422.)

The trial prosecutor identified the potential impeachment issues as having been outlined in a discovery memorandum given to both defense counsel on the preceding day: Santos had suffered two misdemeanor petty theft convictions; the District Attorney's Office had relocated Santos at one point because of threats to her and her family about the case; in April 1997 the Department of Children Services had threatened to remove Santos's children because the Department believed Santos's status as a witness endangered her children in light of threats she had received; and, in response, the trial prosecutor had personally called the County and Children's Services on Santos's behalf because he believed it was inappropriate for the Department to threaten to remove Santos's children solely on the basis of her being a threatened witness. (5RT 2413-2414.)

Earlier on the day of the hearing, Drebert's attorney informed the prosecutor that she intended to ask Santos whether she was a "speed" or amphetamine supplier for appellant or Drebert. The prosecutor had Detective Mena – who was upstairs with Santos during the courtroom discussion – directly ask Santos whether she was a drug supplier. Santos replied that on two occasions in October 1995, around the time she met appellant, she picked up a quarter gram of methamphetamine for appellant in order to get Joanne Rodriguez "off the hook" since appellant was bugging Rodriguez to get speed and heroin for him. However, Santos denied being appellant's "supplier." (5RT 2414.)

The prosecutor argued that the two misdemeanor petty theft convictions should not be permitted for impeachment because they were misdemeanors and unduly prejudicial under Evidence Code section 352. (5RT 2414-2415.) The trial court replied, "the law is quite clear that the convictions themselves are hearsay, so the convictions themselves are not admissible. [¶] However, if any witnesses are prepared to testify exactly what she did on those occasions, that would be admissible." In response, appellant's counsel informed the court that Santos was on probation and argued her probationary status was admissible under federal and California case law. The trial court concurred with appellant's counsel. (5RT 2415.) In response, the prosecutor stated that Santos was not currently on probation, and appellant's counsel clarified that he meant Santos was on probation at the time she spoke to the police. (5RT 2415.) The prosecutor responded that Santos was on misdemeanor probation for one case when she informed police of the statements appellant and Drebert made to her. (5RT 2415-2416.) Santos had been off probation in the other misdemeanor case for eight or nine months. (5RT 2416.)

The trial court ruled that defense counsel could asked Santos whether she was on probation for a criminal offense at the time she gave the statement to police but could not inquire about the particular underlying offense. The prosecutor argued the probation should be identified as misdemeanor probation to avoid giving the jury a false impression about the seriousness of the offense. The court responded that this characterization would be appropriate. (5RT 2416.)

Next, the court noted that the dealings with the Department of Children Services did not appear "relevant in the least." Both defense counsel represented they were not going to pursue that subject. The trial court ruled

that "an inquiry into [Santos] supplying narcotics in the past ... [was] appropriate" for cross-examination. (5RT 2416.)

About the witness relocation issue, appellant's counsel asked whether the defense could inquire whether Santos requested to be relocated. The court ruled that the fact of the request for relocation was admissible, but so was the reason for the request. For purposes of the record, the trial prosecutor stated that he was not personally involved in the relocation; rather, funds to relocate Santos were obtained by West Covina through the District Attorney's Office. (5RT 2417.)

B. Applicable Law

Generally speaking, application–even misapplication–of ordinary rules of evidence does not rise to the level of a constitutional violation; complete exclusion of the defense theory could impair an accused's due process right to present a defense, but the exclusion of defense evidence on a minor or subsidiary point does not. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Review of such deprivations are judged under the state-law harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Id.* at p. 1103.)

Concerning a criminal defendant's constitutional right to confront the witnesses against him:

> As the high court has explained, cross-examination is required in order "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." (*Davis v. Alaska* (1974) 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347.) "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness . . . ." (*Delaware v. Van Arsdall* (1986)

475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674.) The trial court, of course, has a "wide latitude" of discretion to restrict cross-examination and may impose reasonable limits on the introduction of such evidence. (*Id.* at p. 679, 106 S.Ct. 1431.) Thus, "unless the defendant can show that the prohibited cross-examination would have produced 'a significantly different impression of [the witnesses'] credibility' [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment." (*People v. Frye* (1998) 18 Cal.4th 894, 946, 77 Cal.Rptr.2d 25, 959 P.2d 183, quoting *Delaware v. Van Arsdall, supra,* 475 U.S. at p. 680, 106 S.Ct. 1431.)

(*People v. Smith* (2007) 40 Cal.4th 483, 513.) Indeed, in most instances the appellate courts will uphold the exercise of discretion in this regard even if another court might have ruled otherwise. (*People v. Clair* (1992) 2 Cal.4th 629, 655; *People v. Feaster* (2002) 102 Cal.App.4th 1084, 1092.)

C. The Trial Court Did Not Improperly Restrict Cross-examination Of Santos

1. Conduct Underlying Misdemeanor Convictions For Petty Theft

Appellant claims that the trial court prejudicially restricted the cross-examination of prosecution witness Gladys Santos by ruling that defense counsel could not question her directly about the conduct underlying her two misdemeanor petty theft convictions but was required to elicit evidence regarding the underlying conduct through other witnesses. (AOB 103-105.) Appellant has not shown either constitutional or prejudicial error.

At trial, the trial court ruled that, "the law is quite clear that the convictions themselves are hearsay, so the convictions themselves are not admissible. [¶] However, if any witnesses are prepared to testify exactly what she did on those occasions, that would be admissible." (5RT 2415.)

Subsequently, the trial court ruled that defense counsel *could inquire* whether Santos was on probation at the time she gave the statement to police but could *not* ask her about the particular offense. (5RT 2416.)

The trial court did not violate appellant's constitutional rights to due process and to confront witnesses by restricting the way in which defense counsel could pursue this line of inquiry. As appellant highlights (AOB 102), this Court has previously held, "Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach, subject to the court's discretion under Evidence Code section 352." (*People v. Harris* (2005) 37 Cal.4th 310, 337, citing *People v. Wheeler* (1992) 4 Cal.4th 282, 295-297; see also *People v. Smith* (2007) 40 Cal.4th 483, 512-513 [limitation of cross-examination of prosecution witness].) Appellant correctly observes that proof of impeaching misdemeanor conduct may be elicited *from the witness*. (*People v. Wheeler*, *supra*, 4 Cal.4th at p. 300, fn. 14.) To the extent the trial court ruled that the defense would need to present and question witnesses *other than Santos* to elicit the conduct underlying Santos's prior misdemeanor convictions (5RT 2415-2416), that ruling appears incorrect. Yet the trial court's ruling did not completely exclude evidence of a defense theory, and because appellant cannot "show that the prohibited cross-examination would have produced 'a significantly different impression of [the witnesses'] credibility' [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment." (*People v. Frye* (1998) 18 Cal.4th 894, 946.) As a result, this claim fails.

Appellant essentially argues that the trial court's requirement of extrinsic proof of the conduct restricted his ability to cross-examine Santos "regarding whether her probationary status that arose from the petty theft convictions increased the amount of leverage the prosecution had to press for

her cooperation; and (2) whether Santos's testimony implicating [appellant] arose from a desire to deflect suspicion away from herself for possession of the property stolen in the charged crimes." (AOB 105.) He is mistaken.

First, the appellate record does not include a description of the conduct underlying the two misdemeanor theft convictions; therefore, it is not clear that the conduct bore any "nexus" with the current charges, could support an argument that Santos was a "fence," or provided any motive for Santos to falsely inculpate appellant. Although appellant now notes that "Santos was on probation for [petty] theft crimes and the charged crimes were theft crimes" (AOB 105), by statutory definition Santos's petty theft offenses could not have approached the violence and seriousness of appellant's home-invasion robberies.

Second, appellant's focus at trial concerned the introduction of evidence that Santos was *on probation* for one of her two misdemeanor convictions at the time she gave information to Detective Ferrari. (5RT 2415.) And such evidence was introduced, albeit preemptively by the prosecution. (6RT 2518.) Any leverage available to the police or prosecution would have derived from Santos's probationary status, not the conduct underlying her misdemeanor convictions. The court's ruling did not limit counsel's ability to inquire whether Santos's probationary status impacted her interactions with the police.

Third, contrary to appellant's statement that Santos "was initially arrested in connection with the charged crimes" (AOB 105), the jury was informed that Santos was arrested on January 19, 1996, on the misdemeanor charge of delaying an officer in the performance of his duties (due to her denial of appellant's presence inside her apartment). (5RT 2257-2258.) Santos was released from police custody on January 20, 1996, and was not prosecuted for interfering with a police officer because her conduct did not

meet the requirements for filing an offense. (5RT 2307-2308.) Indeed, the charges were rejected for filing within four or five days of January 19, 1996. (5RT 2317.) And although Santos gave J.S.'s answering machine and some jewelry to detectives in January 1996, several days after she was arrested with appellant (6RT 2521-2522, 2526-2527), nearly four months elapsed until she contacted Detective Ferrari in May 1996 and later revealed appellant's statements to him on May 21, 1996. (5RT 2450-2451; 8RT 3158-3159.) In May 1996, Santos was not under arrest and was not charged with any crime. (5RT 2456.)

Finally, the trial court did not absolutely preclude an inquiry into the conduct underlying Santos's two prior petty theft convictions and allowed other impeachment of Santos. Moreover, Santos's testimony on direct and cross-examination yielded evidence unfavorable to her character and permitted the same defense impeachment theory as appellant posits the petty theft convictions would have supported. For instance, the jury learned that Santos lied to police when they came to her apartment looking for appellant and was arrested for delaying a police officer (5RT 2257-2258), waited until May 1996 to inform the police of appellant's December 1995 admissions to the Witters murder and his January 19, 1996 admission that he and "the boys" had "played baseball with Mike's head" (5RT 2454-2455), drove appellant to retrieve the coins he had taken from the Weirs after he told her about the robbery (5RT 2450, 2452), provided methamphetamine to appellant on more than one occasion (6RT 2518-2520) and apparently could obtain drugs easily from a friend as a "favor" (6RT 2542), was on misdemeanor probation in May 1996 when she revealed appellant's confession concerning the robberies and murder (6RT 2518), and possessed property stolen from Ruth Weir, J.S. and Michael Martinez in her apartment.

Given the evidence introduced at trial that tended to show Santos was no stranger to the criminal justice system, appellant has not shown that evidence of the conduct underlying her two petty theft convictions would have cast Santos in a more negative light than her testimony itself created or produced a significantly different impression of Santos's testimony. Therefore, this claim fails.

2. Practice Of Supplying Drugs To Third Parties And Concerns About Losing Child Custody Or Public Assistance Benefits

Appellant further claims the trial court improperly restricted his cross-examination of Gladys Santos by ruling that *Drebert's counsel* needed to provide an offer of proof before inquiring whether Santos dealt drugs to persons other than Drebert or appellant, and by excluding an inquiry concerning Santos's receipt of public assistance benefits pursuant to Evidence Code section 352. (AOB 97, 105-106.) These claims have not been preserved for appeal. Even if preserved, there was no error.

During the hearing held prior to Santos's testimony, the trial court ruled that inquiry into whether Santos supplied narcotics in the past was appropriate. (5RT 2416.) Appellant's counsel elicited Santos's denial she sold drugs to other persons during his cross-examination of Santos. (6RT 2529-2573.)[22/] During a subsequent hearing held concerning whether

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22. During direct examination, Santos testified that in October 1995 she twice purchased a quarter gram of methamphetamine for appellant. On the first occasion, Drebert picked up the drugs. (6RT 2518-2519.) On the other occasion, appellant's sister, Rebecca, picked up the drugs for appellant. (6RT 2519-2520.) On cross-examination, appellant's counsel asked Santos whether she sold methamphetamine to Joanne Rodriguez, or anyone else in the apartment, during the last half of 1995. He further questioned Santos whether she was acquainted with a person referred to as "Bill." (6RT 2532.) Santos denied that she was delivering methamphetamine to Rodriguez on the day she met appellant. (6RT 2531.) Santos explained that the second

Drebert's jury would be presented his videotaped interview with Detective Laurie (6RT 2644-2676), Drebert's counsel stated her intention to ask Santos about receiving public assistance and supplying crystal methamphetamine to people other than Drebert and appellant. Drebert's counsel alleged Santos was a supplier and dealer of crystal methamphetamine and was lying to keep custody of her children and not lose her public assistance benefits. (6RT 2669-2670.) The prosecutor responded that Drebert's counsel was only trying to "dirty up" Santos and that the court should require an offer of proof. (6RT 2672-2673.) The prosecutor observed that Drebert's videotaped statement corroborated Santos. The court inquired whether Drebert's counsel was prepared to call witnesses to testify they engaged in drug transactions with Santos. (6RT 2673.) The court observed that sale of narcotics constituted an act of moral turpitude regardless whether a conviction existed and was relevant to credibility, but he would not permit a mere fishing expedition. (6RT 2674.) The court held that the source of Santos's income, including public assistance, was a collateral matter and excluded such testimony under Evidence Code section 352. (6RT 2674.)

Evidence of specific instances of conduct is admissible to attack the credibility of a witness. (Evid.Code, § 1101, subd. (c).) But as this Court

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occasion on which she provided drugs to appellant, appellant had asked Rodriguez about heroin. Santos described Rodriguez as being "a little bit uptight," and Santos told Rodriguez that she would take care of it. (6RT 2534.) Indeed, Santos said that she obtained methamphetamine for appellant so that he would not bother Rodriguez about it. (6RT 2534-2536.) She clarified that she was able to get the methamphetamine from a friend as a favor, so it did not cost her anything. Appellant's counsel additionally asked Santos whether "Bill" was her drug supplier. (6RT 2542.) Santos was also cross-examined on the question whether she provided methamphetamine or other drugs to appellant and his companions for money or property. (6RT 2534-2536.) She further denied that she had given methamphetamine to appellant, Drebert, or anyone on the day everyone was arrested. (6RT 2566-2567.)

explained in *People v. Eli* (1967) 66 Cal.2d 63, "Counsel must not be permitted to take random shots at a reputation imprudently exposed, or to ask groundless questions 'to waft an unwarranted innuendo into the jury box' [citation].... There is also a responsibility on trial courts to scrupulously prevent cross-examination based upon mere fantasy." (*Id.* at p. 79; see also *People v. Ramos* (1997) 15 Cal.4th 1133, 1173.) In ruling on an Evidence Code section 352 objection, the trial court is not required to either expressly weigh prejudicial effect against probative value or expressly announce compliance with section 352. (*People v. Mendoza* (2000) 24 Cal.4th 130, 178.)

As an initial matter, these claims have not been preserved for appeal. In general, a judgment may not be reversed for the erroneous exclusion of evidence unless "the substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." (See Evid. Code, § 354, subd. (a); see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1144; *People v. Anderson* (2001) 25 Cal.4th 543, 580.) Appellant elicited some testimony on the subject of drug sales to third parties but did not seek to elicit information referenced by Drebert's counsel and did not join in the request posed by Drebert's counsel. (6RT 2529-2573, 2669-2675.) Appellant claims that, although Drebert's counsel made the request, the ruling impacted him as well and demonstrated the futility of him making the same request. (AOB 98, fn. 44.) But neither Drebert's counsel nor appellant's counsel provided an offer of proof substantiating the proposed inquiry. And Drebert and appellant had different juries and different tactical interests. Indeed, appellant's counsel understandably refrained from broaching the child custody question. After all, such questions could invite testimony that the Department of Children Services proposed removing Santos's children from her custody as a result of

appellant's threats -- testimony that would have suggested that the Department took appellant's threats seriously, thereby validating Santos's claim about the threats, evoking juror sympathy for Santos because appellant jeopardized Santos's custody of her children, and adding credulity to her recitation of appellant's confessions and her claims concerning the property taken from J.S. and Ruth Weir. In contrast, Drebert's counsel was not directly saddled with the negative implications of appellant's conduct.

As this Court observed in *People v. Chatman, supra*, 38 Cal.4th at p. 344, where the trial court declined to permit the defense to question a prosecution witness concerning uncharged acts of potential welfare fraud,

> ""[I]mpeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value."" (*Wheeler*, *supra*, 4 Cal.4th at pp. 296-297, 14 Cal.Rptr.2d 418, 841 P.2d 938, fn. omitted.) The court acted within its discretion by refusing to permit defendant, in effect, to prosecute Yvonne for welfare fraud, particularly in the absence of any evidence directly connecting the alleged fraud with her testimony.

(*Id.* at p. 372.)

Here, the failure of Drebert's counsel to provide an offer of proof clearly demonstrated her effort was an unsupported attempt to assassinate Santos's credibility through unfounded innuendo. Because neither Drebert's counsel nor appellant's counsel made an offer of proof suggesting (much less substantiating) that Santos supplied drugs to anyone other than appellant or Drebert, both defense counsel lacked the good faith necessary to ask whether Santos provided drugs to anyone other than appellant or had received stolen

property in exchange for drugs. (See AOB 117.) And even if Drebert's counsel possessed such a good faith belief, it is unclear how such testimony would benefit appellant. After all, if Santos was a "fence" who supplied drugs (and she admittedly supplied drugs to appellant) and possessed property from the Weir and J.S. crimes, those assertions could solidify rather than diminish Santos's credibility regarding appellant's confession. The trial court did not abuse its discretion in declining to permit Drebert's counsel to insinuate that Santos was a drug dealer absent an offer of facts substantiating that assertion.

Moreover, the trial court did not abuse its discretion in excluding any reference to Santos's receipt of public assistance payments, pursuant to Evidence Code section 352.[23] Drebert's counsel sought to link allegations that Santos was a drug dealer and/or fence of stolen property to a hypothetical concern that Santos "would lose custody of her children or lose her public assistance for her acts in connection with the instant case" and appellant now argues such concerns "were directly relevant to the truthfulness of her testimony at trial." (AOB 106.) Again, appellant's argument concerning the relevance of Santos's receipt of public assistance payments is premised upon the unsubstantiated assertion that Santos dealt drugs to persons other than appellant or Drebert and/or fenced stolen property belonging to third persons and that she refused to admit those circumstances because she could lose custody of her children or lose public assistance benefits.

As noted above, Drebert's counsel evidently lacked a good faith basis to conduct this line of questioning. To the extent appellant's assertions are based upon the premise that Santos was an accomplice or participant in the

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23. Section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

charged offenses and sought to dispel suspicion from herself, they are wholly unfounded. Santos was never arrested for the charged crimes, and she initiated contact with Detective Ferrari in May 1996 well after any threat of implication in the charged offenses would have dissipated. The record establishes her children's custody was at risk due to appellant's threats against Santos, not due to any conduct or offense committed by her. Moreover, by admitting at trial that she provided methamphetamine to appellant, Santos admitted a criminal act (see Health & Saf. Code, § 11352) which, following appellant's logic, placed her child custody and public assistance benefits at risk. Therefore, it is unclear how the inquiry Drebert's counsel proposed would have produced a significantly different impression of Santos's testimony.

Nor did the exclusion of evidence of Santos supplying drugs to third parties – if any such evidence indeed was available to be presented – rise to the level of an unconstitutional deprivation of the right to present a defense. To the extent the defense theory was that Santos implicated appellant to deflect suspicion from her own activities as a drug dealer or fence, as discussed above, this theory was not completely excluded. This claim, too, must fail.

3. Prosecutor's Contacts With The Department Of Children And Family Services

As a final cross-examination contention, appellant claims that the court erroneously ruled that the contacts made by the prosecutor with the Department of Children and Family Services on Santos's behalf were irrelevant. (AOB 106; 5RT 2416-2417). On appeal, appellant claims evidence concerning the contacts was relevant as a "circumstance tending to show that Santos's testimony was or may have been influenced by a desire to attain the aid of the prosecution to prevent losing custody of her children by

aiding in the conviction of the defendant." (AOB 106.) At trial, neither defense counsel sought to introduce evidence concerning these contacts and, indeed, appellant's counsel expressly stated, "I wasn't going to go into that." (5RT 2416.) As a result, this claim has not been properly preserved for appeal. (See Evid. Code, § 354, subd. (a); see also *People v. Anderson*, *supra*, 25 Cal.4th at p. 580.)

Defense counsel's election was entirely understandable and reasonable. First, the prosecutor's contact occurred in April 1997, almost one year after Santos revealed appellant's admissions concerning the Witters, Weir, and Martinez incidents to the police and after Gladys Santos testified concerning those admissions at the preliminary examination in case number KA034540 (see 2CT 486-501). Moreover, the admission of evidence that the prosecutor had contacted the Department of Children Services on behalf of Santos would have necessitated the admission of the reason for the contact: that in April 1997 the Department of Children Services threatened to remove Santos's children *because the Department believed Santos's status as a witness in appellant's case endangered her children in light of the threats she had received*, and the trial prosecutor personally called the County and Children's Services on Santos's behalf because he believed it was inappropriate for the Department to threaten to remove Santos's children *solely on the basis of her being a threatened witness*. (5RT 2413-2414.) Although Santos testified about appellant's threats against her and her children (5RT 2457-2459), testimony about the prosecutor's contact with the Department and the motivation for that contact would have supplied a disadvantageous indicia of legitimacy to Santos's claims. After all, a belief by the Department that appellant posed a risk to Santos sufficient enough to warrant removing her children from her custody would validate her testimony rather than undermine it. Similarly, these reasons demonstrate how any error in restricting this line

of questioning could not have produced a significantly different impression of Santos's credibility.

Because appellant has not shown that the prohibited cross-examination would have produced a significantly different impression of Santos's credibility, there was no federal constitutional violation. (*People v. Frye*, *supra*, 18 Cal.4th at p. 946.)

D. Any Error In Restricting Cross-examination Of Gladys Santos Was Harmless

Even if the trial court erred in excluding any of the evidence challenged on appeal, such error was harmless under any standard. (Evid. Code, § 354; *People v. Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman v. California* (1967) 386 U.S. 18, 24.) As noted previously, the excluded evidence had minimal to marginal value for further impeachment of Santos. It follows logically that any error the trial court may have committed in connection with the cross-examination of Santos was also harmless.

For the reasons discussed above, the conduct underlying the misdemeanor petty theft convictions, Santos's potential unsubstantiated drug transactions with persons other than Drebert or appellant or fencing of stolen property for persons other than Drebert and appellant, and the prosecutor's contacts with the Department of Children Services failed to provide a credible motive for Santos to falsely implicate appellant in the Witters, Martinez, Weir and J.S./E.G. crimes. Indeed, any motive for Santos to falsely inculpate appellant or to falsify a confession was exceedingly minimal, if not non-existent. Defense counsel alluded to other motivations for Santos to falsely implicate appellant; for instance, he questioned her whether she was having an affair with appellant between October 1995 through January 1996, whether she told appellant that she was pregnant by him, or that she feared appellant would inform her husband of the affair. She denied all of these accusations.

(6RT 2700.)

Further, as noted above, appellant cross-examined Santos concerning her misdemeanor probation status at the time she provided information to the police as well as her providing drugs to Drebert and appellant. The jury learned that Santos had received some benefit from her cooperation with the police, specifically that either the police or District Attorney's Office paid the security deposit for Santos's new apartment when she relocated. (6RT 2527-2528.) And Santos's testimony on direct and cross-examination yielded evidence unfavorable to her character, demonstrated she was no stranger to the criminal justice system, and afforded the defense the means to argue that her testimony warranted the jury's skepticism and distrust.

Assuming the evidence appellant now claims was erroneously excluded was presented to the jury, it is not reasonably probable that appellant would have received a more favorable outcome; indeed, it is certain any exclusion was harmless beyond a reasonable doubt.

As appellant concedes (AOB 120), there was abundant evidence of the Martinez robbery and attempted murder wholly apart from Santos's testimony. While still hospitalized for his injuries, Martinez identified appellant, codefendant Drebert, Eric Pritchard and Jason Vera as his attackers. (4RT 2206-2210.) Martinez, Jose Canales, Gladys Santos and defense witness Jessica Rodriguez all confirmed that appellant was almost constantly present with Drebert, Pritchard and Vera. (4RT 2126-2129.) Indeed, Martinez, Santos and Rodriguez testified that they called appellant "Dad." (4RT 2165; 9RT 3284.) It was essentially undisputed at trial that appellant, who was the oldest and physically largest of the group, was the ringleader.

J.S. positively identified Pritchard and Vera as two of the four robbers who invaded her home and terrorized her and her husband. She positively identified Pritchard as the perpetrator of one of the forcible oral copulation

counts. Her descriptions of the height and build of four robbers circumstantially implicated appellant as the rapist and leader of the group. Moreover, his identification as the leader was consistent with his role as leader of a group of young men who called him, "Dad." DNA evidence strongly linked appellant to the sexual offenses against J.S., which necessarily implicated him in the other crimes against J.S. and E.G. (7RT 2910-2921, 2943-2948.) And DNA testing *conclusively excluded* Drebert, Pritchard and Vera as donors of the sperm fraction of the vaginal swab taken from J.S. (7RT 2752-2754, 2756-2760.)

A porcelain angel belonging to Ruth Weir found in the apartment Martinez shared with Amy Benson, when combined with Martinez's testimony that Benson hung around the complex with appellant, Pritchard, Drebert and Vera on a near daily basis, further linked appellant to the Weir robbery. (4RT 2165, 2172-2173.) A common modus operandi–multiple men with guns drawn accosting the victims after they drove into their detached garages on a December evening–linked the J.S. and Weir crimes. Similarities in questioning and threats uttered by the robbers to the victims further suggested that the same individuals perpetrated the J.S./E.G. and Weir robberies. The robbers, including Pritchard, repeatedly put guns to the heads of J.S. and E.G. and asked, "Where is the money? Is it worth your life?" (7RT 2926-2927.) When Ruth Weir complained that the robbers were stealing her Christmas presents, one robber leaned over, put a gun to her head and said, "Would you rather have your Christmas presents or your life?" (8RT 3083.)

Additionally, other evidence corroborated Santos's account of appellant's confession concerning the Weir robbery in respects that could only have been known by one of the robbers. Santos testified that appellant called her one night and asked her to pick him up at a location near the Lido

Apartments. (5RT 2450.) Appellant told Santos, "We just robbed somebody." He told her they had taken Christmas presents, a white car, and groceries during the robbery and that a police officer lived in the house. He directed Santos to a residence in West Covina that was near a school and was approximately four blocks from the Lido Apartments. Appellant directed Santos to a location where he said he had hidden some coins and other items he had taken from the residence. Appellant got out of the car and picked up a branch, then returned to the car and said nothing was there. (5RT 2449-2453.) Ruth Weir testified that the robbers stole a Ziplock sandwich bag containing commemorative coins, and one of her neighbors returned the coins to her approximately a week after the robbery. (8RT 3088-3090.) Other corroborating evidence included appellant's command over Drebert, Pritchard and Vera during their daily interactions, Ruth Weir's description of the robbers and the robbery, and the recovery of Weir's gold chains from Santos's apartment in a room used by appellant's daughter. Finally, Weir's neighbor identified a two-tone car similar to that driven by appellant's cousin, Jessica Rodriguez, as being outside the Weir home both before and immediately after the robbery. (8RT 3103-3104.)

Finally, the fact J.S.'s answering machine and Weir's gold chains were recovered from Santos's apartment–which was the location where appellant was arrested, where he had lived for the past three days, and the place where his daughter had resided for more than one week and was babysat daily for weeks–served as additional strong circumstantial evidence of appellant's guilt in the J.S./E.G. and Weir incidents even apart from Santos's statements that appellant brought the items to her apartment.

Considering the evidence amassed against appellant for all of the offenses, any error in restricting cross-examination of Gladys Santos was harmless.

VI.

THE ELICITATION OF APPELLANT'S CONFESSION TO THE WITTERS MURDER DID NOT VIOLATE THE RULE OF *BRUTON v. UNITED STATES* (1968) 391 U.S. 123; IN ANY EVENT, ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

At appellant's trial, prosecution witness Gladys Santos testified that she initiated a conversation with appellant in which he ultimately confessed to killing a man with a belt. (5RT 2436-2443.) Although codefendant Drebert's detailed statement inculpating appellant in the murder of Koen Witters (see 5RT 2462-2481 [red jury only]) was not introduced before appellant's jury, appellant claims Santos's testimony–that she had a conversation with a civilian "who indicated that they had been present at a murder," several days later she initiated a conversation with appellant to "confront this person about what I was told," and that appellant replied, "That pussy Mike told you, huh?" to Santos's question, "Is it true? Did you really kill someone with a belt?"–permitted the jury to infer that codefendant Drebert had told Santos that he was present when appellant killed Witters with a belt. Appellant claims this inferential admission of Drebert's statement violated his Sixth Amendment right to confront the witnesses against him, his Fifth Amendment right to due process, and his Eighth Amendment right to a reliable capital conviction and requires reversal of his murder conviction and death sentence. (AOB 121-135.)

Santos's reference to a conversation with a third party merely conveyed that someone had been present at a murder. The first inculpatory reference to the third-party conversation–which took the form of Santos's question to appellant–was independently admissible as an adoptive admission. Appellant's own statements identifying codefendant Drebert as a possible source of the information were admissible and did not render the prior

testimony improper. Santos's recitation of appellant's ultimate confession identified two people–codefendant Drebert and Eric Pritchard–as being present during the murder, and the jury heard that Santos denied Drebert was the informer during her conversation with appellant. To the extent Santos's testimony may have, when considered in combination with other evidence, permitted the jury to infer that either Drebert or Pritchard ("Little Giant") told her that appellant killed someone with a belt, this chain of inferences did not violate the rule of *Aranda/Bruton* and their progeny.

A. Trial Court's Ruling

Before prosecution witness Gladys Santos was called to testify, the prosecutor informed the court that Santos would testify about statements made by appellant and Drebert, and some of their statements tended to inculpate the other defendant. (5RT 2412-2413.) The prosecutor outlined details of the statements and circumstances to get pre-approval of his proposed mode of questioning. (5RT 2418-2419.) The prosecutor initially proposed to elicit that Santos confronted appellant about killing Witters after getting information from Drebert. The trial court, however, observed that such questioning would permit the jury to put "two and two together" and defeat the purpose of separate juries. (5RT 2419-2420.) Instead, the trial court ruled that the prosecutor could not directly mention Drebert in his questioning. (5RT 2420.)

In response, appellant's counsel proposed that they resolve the *Bruton* problem by asking, "Did you receive information about the homicide?" (5RT 2420) and then follow that answer with the question, "And did you receive that information from another party?" The trial court noted that the prosecutor could modify the proposed followup question to ask if Santos received information "from another party who indicated he was present." (5RT 2421.)

The court also ruled that the prosecutor could elicit that the source of Santos's information was a civilian with personal knowledge. (5RT 2422.)

B. Santos's Testimony Concerning Appellant's Confession

Before appellant's jury, the prosecutor initiated an inquiry concerning appellant's admissions to Gladys Santos as follows:

> Q "Miss Santos, in December of 1995, did you have a conversation with someone who had indicated that they had been present at a murder?"
>
> A Yes, I did.
>
> Q This person that you had the conversation with, that wasn't a police officer; is that right?
>
> A No, no, it wasn't.
>
> Q It was another civilian, an ordinary person; is that correct?
>
> A Yes.
>
> Q When did this conversation take place in relation to Christmas, 1995?
>
> A Very close.
>
> Q Before or after?
>
> A The presents hadn't been opened yet.

(5RT 2433-2434.)

After additional clarification concerning the timing of the conversation, the prosecutor continued his questioning as follows:

> Q After you had this conversation with this person who said he had been at the scene of a murder, or at a murder when it occurred, did you have a conversation with the defendant, [appellant]?
>
> A Yes, I did.
>
> Q How long after you had the initial conversation with this other person was it that you had the conversation with [appellant]?
>
> A I waited three days.
>
> Q I'm sorry?
>
> A I had waited three days.
>
> Q You waited three days for what?
>
> A To ask
>
> Q To ask who?
>
> A To confront this person of what I was told.
>
> Q You waited three days to talk to [appellant] about it?
>
> A Yes.

Q This conversation that you had three days later, did you start the conversation, or did the defendant [appellant] start the conversation?
A I did.
(5RT 2435.)

Santos explained that this conversation and the prior conversation had occurred in her apartment. (5RT 2435-2436.) Santos initiated the conversation by asking appellant, "Is it true? Did you really kill somebody with a belt?" (5RT 2436, 2438.) In response, appellant laughed. Santos asked him again, "Is it true?" Appellant replied, "That pussy Mike told you, huh?" (5RT 2438.) Santos responded, "No." Appellant stated that Mike was weak. Santos again denied that "Mike" had told her. Santos asked, "Did you really do that?" Appellant replied, "Yes." Santos then asked, "Why did you do it?" Appellant changed the subject. (5RT 2439.)

Later, after Santos again resumed the subject, appellant admitted he used a belt to kill someone and demonstrated for Santos how he had used the belt to kill the victim. (5RT 2439-2441.) Appellant told Ms. Santos that the murder occurred in an apartment "they had been watching" in order to commit a robbery. (5RT 2441.) Appellant said the victim had been shaving, and that appellant had watched the victim shave. Appellant said he killed the victim because he had seen appellant without a mask. He strangled the victim because using a gun would be too loud. Appellant told Ms. Santos that he was with Drebert and "Little Giant" when the murder occurred. (5RT 2442.) Appellant said that after he attempted to strangle the victim, he left the room. When he returned, the victim was not dead. Appellant called Mike into the room to hold one end of the belt. Appellant initially said he "shanked" the victim. Later appellant said, "Well, the motherfucker wouldn't die, so I cut him." (5RT 2443.)

C. Applicable Law

The *Aranda/Bruton* doctrine prohibits introduction of the facially incriminating extrajudicial admission or confession of a non-testifying codefendant against the defendant. (*Bruton* v. *United States*, *supra*, 391 U.S. at pp. 126, 135-136; *People* v. *Aranda* (1965) 63 Cal.2d 518, 530-531.)[24/]

In *Bruton v. United States*, *supra*, 391 U.S. 123, the prosecution elicited, as evidence in their joint trial, Evans's confession implicating himself and codefendant Bruton as participants in the crime. (*Id.* at p. 124.) Although the jury was instructed to consider Evans's confession only against Evans, the high court concluded that such an instruction was insufficient to cure the prejudice to the jointly tried defendant because the jury could not reasonably be expected to obey the instruction. (*Bruton*, *supra*, 391 U.S. at pp. 135-136.)

In *Richardson v. Marsh* (1987) 481 U.S. 200, the Supreme Court examined a redacted confession admitted in the joint trial of two defendants. The redaction examined in *Richardson* omitted all indication that anyone other than the declarant and a third person had participated in the crime. (*Id.* at p. 203.) The named third person was also charged with the crime but was a fugitive and therefore not jointly tried. (*Id.* at p. 202.) The redacted confession related a conversation that occurred in the car on the way to the robbery; the conversation acknowledged that the victims would be robbed and killed. Defendant Marsh testified at trial, and her testimony placed herself in the car when the conversation related in the codefendant's confession occurred. (*Id.* at p. 204.) The high court distinguished the confession in

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24. The enactment of Proposition 8 in 1982 abrogated *Aranda* to the extent it imposed greater restrictions on the admissibility of a codefendant's confession than required under the federal Constitution. (*People v. Fletcher* (1996) 13 Cal.4th 465; see *People v. Mitcham* (1990) 1 Cal.4th 1027, 1045, fn. 6.)

Bruton because, "in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony)." (*Id.* at p. 208.)

More recently, the high court has clarified that "*Richardson* placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially." (See *Gray v. Maryland* (1998) 523 U.S. 185, 195.) Confessions that incriminate a codefendant only when linked with evidence introduced later at trial do not violate the codefendant's right to confrontation. (*Gray v. Maryland*, *supra*, 523 U.S. at pp. 195-196.)

D. No *Bruton* Error Occurred

Essentially, appellant complains that the testimony elicited from Gladys Santos permitted his jury to infer that "Drebert told [Santos] that he was present when [appellant] killed Witters's with a belt." (AOB 127.) Appellant highlights the admission of the following testimony given by Santos to support his argument: (1) Santos had a conversation with a civilian "who indicated that they had been present at a murder"; (2) several days later Santos initiated a conversation with appellant to "confront this person about what I was told"; (3) Santos opened her conversation with appellant by asking, "Is it true? Did you really kill someone with a belt?"; and (4) appellant replied, "That pussy Mike told you, huh?" (AOB 124-127, 130-133.) Appellant argues that, because appellant's jury was aware that Drebert was charged with Witters's murder, permitting Santos to testify that someone who was present at the murder inculpated appellant was error: "the jury could only conclude that Drebert was the person who told Santos that he was there when someone had killed a man with a belt. Upon hearing that, since there were but two defendants, the jury could only conclude that Drebert said the actual killer was [appellant]." (AOB 131.) This inference was confirmed, appellant argues, when Santos was permitted to testify that when she confronted appellant with

the information she had learned, he responded with the question as to whether "Mike" had told her that information. (AOB 131.) Not so.

First, appellant complains that the trial court erred by ruling that "the prosecution could elicit from Santos that she learned of the homicide from 'a civilian with personal knowledge.'" (AOB 130-131.)[25/] Santos affirmatively answered the question, "did you have a conversation with someone who had indicated that they had been present at a murder?" and specified that the person with whom she spoke was not a police officer. (5RT 2433-2434.) As elicited, this statement did not directly implicate either Drebert or appellant in the murder, did not identify the source of the information to be codefendant Drebert, and did not maintain that the person communicating the information was a participant in the murder. This testimony did not violate *Bruton*.

Nor did Santos's subsequent testimony that she later initiated a conversation with appellant to "confront this person about what I was told" (5RT 2435) violate *Bruton*. Again, even viewed in combination with the preceding testimony, Santos's testimony did not identify Drebert as the source or appellant as the killer. This testimony did not violate *Bruton*.

Indeed, the first indication that appellant had been identified as the perpetrator of a murder arose with Santos's question to him, "Is it true? Did you really kill somebody with a belt?" (5RT 2436.) But this question, appellant's first response (laughter), and his subsequent reply, "That pussy Mike told you, huh?" (5RT 2438) were independently admissible as an adoptive admission. (Evid. Code, § 1221.) Santos's question was a necessary part of appellant's admission. Rather than immediately deny the inquiry,

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25. Although appellant further complains this testimony was "rank hearsay" (AOB 130), no evidentiary objection was entered to this specific question on this ground at trial. (4RT 2433-2434.) As a result, any hearsay objection was waived. (See Evid. Code, § 354, subd. (a); see also *People v. Anderson*, *supra*, 25 Cal.4th at p. 580.)

appellant himself posed a derogatory inquiry concerning a potential source of Ms. Santos's information. In other words, this testimony did not introduce a codefendant's statement–it was a statement by appellant himself. And to the extent Santos's question incorporated or distilled statements made by codefendant Drebert, he was not expressly or directly identified as the source of the information. This testimony did not violate *Bruton*.

Finally, the admission of *appellant's own statement* identifying Drebert as the possible provider of the information did not violate the confrontation clause or other constitutional protection. (Evid. Code, § 1220; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1049 ["the hearsay rule does not compel exclusion of any statement offered against a party declarant, whether or not it can be described as an admission."].)

Contrary to appellant's claim, the jury need not have inevitably inferred that *Drebert* was the source of the information provided to Santos. Although Santos testified that appellant initially asked her whether "Mike" was the person who prompted her to inquire about the killing, she also testified that, in response, she repeatedly denied "Mike" was the source. (5RT 2439.) And ultimately, Santos testified that appellant told her that appellant, Drebert and "Little Giant" were present when the murder occurred. (5RT 2442.)[26/]

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26. Appellant asserts that Santos's preliminary hearing testimony did not convey that appellant told her Eric Pritchard ("Little Giant") was also present during the Witters murder. (AOB 127, fn. 52.) But no question was asked to elicit or clarify this point at the preliminary hearing and little motivation existed to do so since no other defendant was charged with the murder and Drebert's own admissions inculpated him in the murder. (2CT 488-495.) In any event, this uncontradicted testimony at appellant's trial served to suggest that Pritchard -- not Drebert -- was the source who prompted Santos to inquire of appellant.

Additionally, during his opening argument, the prosecutor referenced the evidence presented to appellant's *jury*: "He told Gladys Santos that he was with Michael Drebert and Little Giant, and you know from Gladys Santos' other testimony that Little Giant is Eric Pritchard, ..." (10RT 3591.)

Santos's challenged testimony did not convey a facially incriminating admission by codefendant Drebert. At most, the brief and paraphrased reference to her conversation with a third party incriminated appellant only when linked with evidence of Santos's confrontation with appellant and appellant's own admissions. Any inferential linkage to either Drebert or Pritchard did not violate the Constitution.

E. Any Error In The Elicitation Of Santos's Conversation With Appellant Was Harmless

Whether *Aranda-Bruton* error requires reversal of a conviction is evaluated under the "harmless beyond a reasonable doubt" standard of *Chapman v. California*, *supra*, 386 U.S. 18. (*Lilly v. Virginia* (1999) 527 U.S. 116, 139-140.) Where a defendant's admission or confession is also admitted, it may be considered in assessing whether any Confrontation Clause violation was harmless. (*Cruz v. New York* (1987) 481 U.S. 186, referencing *Harrington v. California* (1969) 395 U.S. 250 [error harmless where other evidence overwhelming and improperly admitted evidence cumulative].)

In this case, the elements of the Witters murder were established by the crime scene investigation and autopsy. To the extent Santos's recitation of her conversation with appellant incorporated aspects of her conversation with Drebert, it was vague and lacked specifics. In essence, Santos's recitation of Drebert's statements at most communicated that a person present when the murder occurred told her that appellant killed someone with a belt. Thus, the point resolved by challenged testimony was appellant's identity as the perpetrator. On this point, the statement was limited and cumulative.[27/]

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27. The majority of the information the jury learned about the third-party statement was elicited by appellant's counsel, not the prosecution. (6RT 2547-2548.) Appellant's counsel elicited that, several days before Christmas 1995, someone knocked on the door to Santos's apartment and she answered. Two people were outside, and she let them in. The person who told her about

Appellant made a detailed and self-corroborating confession to the murder of Koen Witters. Indeed, his confession provided details that could only have been known by the killer or someone present when the murder occurred. Particularly, appellant's confession revealed that he had observed the victim shaving prior to entering the apartment to rob him (5RT 2442); investigating officers found shaving cream and stubble in Witters's bathroom sink. (5RT 2372). Appellant admitted strangling and cutting the victim (5RT 2439-2441, 2443); Witters was bound, gagged, strangled, and his wrists cut, and the small quantity of blood suggested Witters was dead or dying when the cuts were made (5RT 2368, 2370, 2382, 2389-2390; 7RT 2812-2820, 2831-2832). Witters's Apple MacIntosh computer was stolen during the robbery. (5RT 2344-2345, 2351-2354, 2357-2358, 2373-2376, 2381.) After the murder, appellant asked Santos if she knew anyone who wanted a desktop Apple MacIntosh computer. (5RT 2447-2448, 2461.) Appellant commented that the victim "liked to travel to Europe" (5RT 2447) and liked Asian women (5RT 2445, 2447); Witters was a Belgian citizen, his girlfriend was Taiwanese, and a photograph of an Asian woman was found on his ransacked bed. (5RT 2334-2337, 2346-2348, 2371-2372.)[28]

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the murder appeared to have been drinking. She described him as "marinated." (6RT 2548.) She had him stay at the apartment for two hours to sober up; he was not too intoxicated that she feared he would be arrested. (6RT 2549.) The person said "they" had been scoping a residence and appellant had seen the person shaving. (6RT 2549-2550.) He tied the victim at appellant's direction. The victim liked to travel, liked Europe, liked Asian women, and was preparing to travel. (6RT 2550.) He assisted in strangling the victim. (6RT 2550-2551.)

28. In a footnote, appellant notes that his jury was not presented evidence that Drebert's car was used in the Witters crime; however, during argument, the prosecutor argued that the Witters burglary continued until the stolen property was loaded into Drebert's car and driven away. (AOB 134, fn.

Contrary to appellant's claim, the third-party's inculpatory statement did not "interlock" with appellant's confession in such a way as to overshadow the latter's powerfully incriminatory value. In this case, assuming the challenged third-party statement permitted an inference violative of the *Bruton* rule, the error was harmless beyond a reasonable doubt.

55; see 10RT 3584.) This reference was not prompted by or related to Santos's testimony before appellant's jury. In any event, this single erroneous reference did not heighten any prejudice created by the inquiry eliciting appellant's admission to the Witters murder or amount to prejudicial misconduct. The jury was instructed that the statements of counsel were not evidence (CALJIC No. 1.02; 5CT 1253), and if appellant's counsel had believed that this fleeting reference warranted more specific clarification, he would have objected and any potential prejudice would have been cured.

VII.

THE TRIAL COURT PROPERLY JOINED ALL CHARGED COUNTS

Appellant contends that the trial court's erroneous refusal to sever the Martinez, Weir and J.S./E.G. charges from each other, and the subsequent erroneous joinder of the charges arising from the murder of Koen Witters to those charges, violated his constitutional rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and the parallel provisions of the California Constitution and require reversal of his convictions and death judgment. (AOB 136-183.) Here, the charges met the statutory requisites for joinder, and appellant failed to demonstrate a clear potential for prejudice existed at the time the trial court denied severance of similar crimes with cross-admissible evidence or later joined the Witters charges to the other counts. The trial court did not abuse its discretion in denying the initial motion to sever the Martinez, Weir and J.S./E.G. charges from each other or later joining the Witters charges to those counts, and appellant's claims of constitutional error likewise must fail.

A. The Applicable Authority And Standard Of Review

"'The law prefers consolidation of charges.'" (*People v. Manriquez* (2005) 37 Cal.4th 547, 573; *People v. Ochoa*, *supra*, 26 Cal.4th at p. 423.) As this Court has observed,

> The benefits to the state of joinder [are] significant. Foremost among these benefits is the conservation of judicial resources and public funds. A unitary trial requires a single courtroom, judge, and court attaches. Only one group of jurors need serve, and the expenditure of time for jury voir dire is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the

appellate process.

(*People v. Bean* (1988) 46 Cal.3d 919, 939.)

Section 954, which governs joinder of counts in a single trial, provides in relevant part:

> An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated.

Additionally, section 954.1[29] provides as follows:

> In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact.

"Severance may nevertheless be constitutionally required if joinder of the offenses would be so prejudicial that it would deny a defendant a fair trial." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243.) "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*People v.*

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29. "The voters adopted this statute in Proposition 115, which took effect on June 6, 1990. Section 954.1 applies to trials held after its enactment[.] Section 954.1 codified existing case law, and did not materially change the rules of severance." (*People v. Stitely*, *supra*, 35 Cal.4th at p. 533, fn. 9, citations omitted.)

Carter, *supra*, 36 Cal.4th at pp. 1153-1154, internal quotations and citations omitted.)

A trial court's ruling on a severance motion is reviewed for abuse of discretion on the basis of the facts known to the court at the time of the ruling. (*People v. Box, supra,* 23 Cal.4th at p. 1195; *People v. Alvarez, supra,* 14 Cal.4th at p. 189.) In other words, the denial of a motion to sever is reviewed to determine "whether the denial fell outside the bounds of reason." (*People v. Manriquez, supra,* 37 Cal.4th at p. 573 [internal quotations omitted, citation omitted]; *People v. Maury*, *supra*, 30 Cal.4th at p. 391.) The trial court's discretion is assessed,

> "in light of the showings then made and the facts then known. [Citations.]" In *Williams v. Superior Court*, *supra*, 36 Cal.3d at pages 452-454, 204 Cal.Rptr. 700, 683 P.2d 699, we described in detail the factors through which the trial court's exercise of discretion is channeled: whether evidence of the crimes to be tried jointly would or would not be cross-admissible; whether some of the charges are unusually likely to inflame the jury against the defendant; whether the prosecution has joined a weak case with a strong case (or with another weak case), so that a "spillover" effect from the aggregate evidence on the combined charges might alter the outcome as to one; and whether any of the joined charges carries the death penalty. The burden of demonstrating an abuse of discretion rests with the party seeking severance--here defendant--who must "'clearly establish'" a "'substantial danger of prejudice requiring that the charges be separately tried.'"

(*People v. Musselwhite*, *supra*,17 Cal.4th at p. 1243, citations omitted; see also *People v. Manriquez, supra,* 37 Cal.4th at p. 573; *People v. Valdez* (2004) 32 Cal.4th 73, 120.)

If charges are properly joined under section 954, a "'defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying defendant's severance motion. [Citations.]'" (*People v. Valdez, supra*, 32 Cal.4th at p. 119; see also *People v. Sapp* (2003) 31 Cal.4th 210, 258.) Where two cases are joined but the evidence of the offenses is cross-admissible, there is no prejudice. (*People v. Gray* (2005) 37 Cal.4th 168, 222.)

Even if a trial court abuses its discretion in failing to grant severance, reversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial. (*People v. Coffman* (2004) 34 Cal.4th 1, 41.) Finally, "[e]ven if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the 'defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process.'" (*People v. Mendoza, supra*, 24 Cal.4th at p. 162; accord *People v. Valdez, supra*, 32 Cal.4th at pp. 120-121.)

B. The Court Properly Denied Appellant's Motion To Sever The J.S., Weir And Martinez Crimes

1. Procedural History

Following a preliminary hearing, on February 28, 1996, appellant and Drebert were held to answer for charges arising from the Martinez and Weir offenses in Los Angeles County Superior Court case number KA030671. (1CT 3-4, 10-86.) On March 13, 1996, an information was filed in Los Angeles County Superior Court case number KA030671 charging appellant and codefendant Drebert with four felony counts: the attempted murder of Michael Martinez (§§ 664/187, subd. (a); count 1), residential robbery committed in concert (§§ 211, 213, subd. (a)(1)(A); counts 2 and 3), and the carjacking of Ruth Weir (§ 215, subd. (a); count 4), with special allegations

that appellant and Drebert personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)) in the commission of the attempted murder, personally inflicted great bodily injury (§ 12022.7, subd. (a)) in committing the attempted murder, and personally used a firearm (§ 12022.5, subd. (a)) in the commission of the carjacking. (IV Supp 1CT 15-19.)

A complaint charging codefendant Eric Anthony Pritchard with the same four charges alleged as to appellant and Drebert was filed on March 19, 1996. (1CT 99.) A complaint charging codefendant Anthony Vera with the same four charges alleged as to appellant and Drebert was filed on May 2, 1996. (1CT 102.) On May 14, 1996, following a preliminary hearing, the complaint was amended by interlineation to add a violation of Vehicle Code section 10851, subdivision (a) (count 5) as to both Pritchard and Vera. Pritchard was held to answer on Counts 1, 2 and 5, the Weir robbery and carjacking charges were dismissed as to both Pritchard and Vera, and Vera was held to answer on the attempted murder and robbery of Martinez only. (IV Supp 1CT 52-100.)

On May 23, 1996, a 10-count information was filed in case number KA031580 charging appellant, Eric Pritchard, and Jason Vera with the offenses committed against J.S. and E.G. on December 15, 1995, as follows: two counts of home invasion robbery (§ 211, 214, subd. (a)(1)(A); counts 1 and 2), three counts of forcible oral copulation in concert (§ 288a, subd. (d); counts 3, 5 and 6), two counts of forcible rape in concert (§ 264.1; count 4 and 10), one count of false imprisonment (§ 236; count 7), and two counts of carjacking (§ 215, subd. (a); counts 8 and 9). It was further alleged as to counts 3, 4, 5 and 6 that appellant and his codefendants used a firearm within the meaning of section 667.61, subdivisions (a), (b) and (e) and that as to counts 1, 2, 7, 8 and 9 appellant and his codefendants each personally used a

firearm within the meaning of section 12022.5, subdivision (a). (IV Supp 1CT 101-109.)

On July 15, 1996, on the People's motion (1CT 181-193), case numbers KA030671 (Martinez and Weir offenses) and KA031580 (J.S./E.G. offenses) were consolidated into case number KA030671. (1RT 18-19; 1CT 211-212.) At the hearing on the motion, all defense counsel submitted the consolidation question without papers or argument, subject to the filing of a motion for severance at a later date. (1RT 18-19.) On July 17, 1996, an amended 14-count information was filed in case number KA030671. (IV Supp 1CT 139-151.)

On September 12, 1996, in case number KA033346, Vera was held to answer on the J.S./E.G. charges and waived a renewed preliminary hearing as to the charges alleged concerning the Martinez and Weir incidents. (IV Supp 1CT 152-256.) By written motion filed October 16, 1996, the People moved to consolidate case number KA030671 with case number KA033346 (charging Jason Vera). (1CT 219-229, 231-234.) The People filed a supplemental memorandum to the motion on November 4, 1996, noting that the charges were not only the same class of crimes but were "connected together in their commission" since they involved the same participants, same elements, and same modus operandi. (1CT 231-234.)

On November 5, 1996, codefendant Vera filed a motion for separate trials. (IV Supp 1CT 257-267; 1RT 56.) On November 12, 1996, the People filed an opposition to the motion (filed by codefendant Vera and joined by appellant and codefendants Pritchard and Drebert) to sever trials of the various incidents. (1CT 236-249.) In the detailed opposition, the People outlined the evidence that would be presented concerning the three charged incidents – including that J.S. had identified appellant at his preliminary hearing, E.G. had identified appellant at a live lineup, appellant had admitted

participation in the Weir crimes to "a civilian witness," property taken during the Weir robbery (and discovered in the apartment Michael Martinez shared with Amy Benson) was given to Amy Benson by appellant, and property taken during the J.S./E.G., Weir, and Martinez incidents was found in the apartment where appellant was arrested and identified by the tenant "as having been left at the apartment by defendant Capistrano." (1CT 237-242.)

On November 18, 1996, appellant filed a motion to sever the charges into three trials (counts 1-10, counts 11-12, and counts 13-14). In the motion, appellant characterized the crimes as constituting "different classes of crimes" and that the evidence of appellant's guilt was strong as to the Martinez offense but weak as to the Weir and J.S./E.G. offenses. (1CT 264-274.)[30]

2. Hearing On The Motion To Sever The Martinez, Weir And J.S./E.G. Incidents

The motion for severance was heard the following day on November 19, 1996. (1RT 56-73.) The court stated that it found appellant's motion to be an "interesting request" (1RT 58) and was "entertaining the request" (1RT 59). The prosecutor argued that the three incidents were properly joined because the crimes were all of the same class, all began as residential robberies, the participants in each incident overlapped, the victims were similarly bound and gagged in all three incidents, and the J.S./E.G. and Weir crimes had similar common characteristics in that each was a "follow-home robbery" where the victims were accosted in their garages and forced into their homes at gunpoint, and were threatened to reveal the location of valuables or be killed. (1RT 60-62.) The prosecutor argued that the

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30. On November 18, 1996, appellant also filed a motion to sever his trial from that of codefendant Drebert pursuant to section 1098 and *People v. Aranda*, *supra*, 63 Cal.2d at p. 518, on the ground that Drebert's statements to police inculpated him in the Weir and Witters offenses. (1CT 250-263; 1RT 56-58.)

possibility of antagonistic defenses was insufficient to grant severance, none of the counts were more "emotional" than the others since all were "vicious" crimes and no weak counts/incidents were joined to strong counts/incidents. (1RT 62-64.) Finally, the prosecutor argued that the incidents were cross-admissible given the property found, common participants, and common elements among the incidents. (1RT 64-66.)

In contrast, appellant's counsel argued "there were grave differences in the strength of the People's case against [appellant] in all three of the incidents." She argued that the strongest count concerned the Martinez crimes but the motivation was different and the robbery was an afterthought; the evidence concerning the Weir crimes consisted of Drebert's statement to police (which the prosecution said it would not use) and the property found in the Martinez and Santos residences; and the evidence pertaining to the crimes against J.S. was unclear given that the DNA evidence was not yet available and the identifications were not "strong." (1RT 70-72.) Appellant's counsel also argued that the outstanding DNA testing results would result in a delay in the other cases, which could go to trial without the DNA evidence. (1RT 72.)

The trial court denied the motion to sever the counts: "As to each of the defendants, the court will deny the motion to sever and deny the motion for separate trials. As to separate counts, I will not preclude the trial court from ordering separate juries as deemed appropriate by that trial court." (1RT 73.)

3. The Trial Court Did Not Abuse Its Discretion In Declining Severance Of The Weir, J.S./E.G. And Martinez Incidents

The trial court did not abuse its discretion in declining to sever the Martinez, J.S./E.G. and Weir incidents from one another. Appellant has not made a clear showing that the trial court abused its discretion. Indeed, all four

factors traditionally considered by the reviewing courts weigh against appellant's assertion of prejudice.

Although appellant initially complains that "the trial court undertook no analysis of cross-admissibility and no analysis of prejudice to [appellant] that would result from trial on the joined offenses" (AOB 147), the trial court's ruling included an implicit finding that appellant would not be prejudiced by the joinder. (Evid. Code, § 664.) Indeed, appellant's entire argument addressed the potential prejudice to appellant. The trial court was not required to verbalize its evaluation of prejudice or utter a statement of reasons for the denial. Appellant's mere disagreement with the trial court's ruling does not demonstrate an abuse of discretion.

First, appellant argues that the evidence before the trial court did not support a finding the offenses were cross-admissible. (AOB 148-156.) Specifically, he observes that some of the facts highlighted by the prosecutor "were unsupported by the record before the trial court at that point in time." (AOB 150.) A trial court's ruling on a severance motion is reviewed for abuse of discretion on the basis of the facts known to the court at the time of the ruling. (*People v. Box, supra,* 23 Cal.4th at p. 1195; *People v. Alvarez, supra,* 14 Cal.4th at p. 189.) The trial court was entitled to rely upon the representation of the parties, which became part of the record before the court in considering the motion. This was particularly true where the prosecution's representations were undisputed by appellant's counsel.

As this Court explained in *People v. Johnson* (1988) 47 Cal.3d 576, the issue of cross-admissibility ""is not the cross-admissibility of the charged offenses but rather the admissibility of relevant evidence"" that tends to prove a disputed fact. (*Id.* at p. 598; see Evid.Code, § 201.) Here, the transactions were cross-admissible as presenting a common design or plan. (See generally *People v. Kipp* (1998) 18 Cal.4th 349, 369-371.)

The prosecution's offer of proof (1CT 237-242) established a common plan or scheme as to the Weir and J.S./E.G. offenses. Indeed, the J.S./E.G. and Weir crimes had identical modus operandi. In each case, multiple masked and gloved men with guns drawn accosted the victims after they drove into their detached garages on a December evening and forced them into their homes to ransack the residences and steal property. The offenses shared other common elements, including that the robbers covered their faces, wore gloves, questioned the victims about the location of valuables and threatened to shoot and kill them if they did not follow instructions or fully reveal the location of valuables. A similar modus operandi was illustrated by the circumstances of the Martinez robbery, in that appellant and his cohorts entered Martinez's apartment soon after he returned home from work and while he was vulnerable (in the shower), and threatened to kill him if he failed to disclose the location of valuables. The J.S. and Martinez incidents shared a common element of binding and gagging. Moreover, the Martinez, Weir, and J.S./E.G. incidents all involved multiple perpetrators, and appellant was the common perpetrator in all of the incidents. Appellant brought property stolen from Ruth Weir (gold chains), J.S. (answering machine), and Martinez (identification, wallet) to the apartment where he was arrested. Additionally, property stolen during the Weir robbery (porcelain angel) was discovered in the apartment of Michael Martinez. And the trial court was informed that Amy Benson had revealed that appellant gave that item to her. Finally, the trial court was told that appellant admitted the Weir robbery to a civilian witness (Gladys Santos).

Here, in essence, the question "is not cross-admissibility of the charged offenses" but rather "the interplay of evidence between the two occurrences." (*People v. Johnson, supra*, 47 Cal.3d at pp. 589-590.) As noted by this Court in *People v. Carpenter* (1997) 15 Cal.4th 312,

> Evidence of both incidents would have been admissible at separate trials of each. The ballistics evidence showed that the same gun was used each time, strongly indicating that the same person committed each crime. Thus, evidence that defendant was the gunman in one incident was evidence that he was the gunman in the other. The evidence of identity was strong for both incidents.

(*Id.* at p. 361, citing *People v. Medina* (1995) 11 Cal.4th 694, 748-749 ["[T]he ballistic evidence alone probably would have been sufficient to justify admission of the 'other crimes' evidence."]; see also *People v. Cunningham, supra*, 25 Cal.4th at p. 985 ["Because complete cross-admissibility is not necessary to justify the joinder of counts [citation], in the present case the cross-admissible evidence concerning the gun would justify such joinder."].) Here, there was sufficient cross-admissible evidence concerning all three incidents so that the trial court did not abuse its discretion in declining to overturn the statutory presumption of joinder.

In any event, the absence of cross-admissibility does not by itself demonstrate prejudice. (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 161.) Therefore, this Court must examine the other factors to determine if an abuse of discretion occurred. (*Ibid.*)

First, each incident involved a robbery combined with other offenses: the Martinez offenses included a robbery and attempted murder; the Weir offenses charged a carjacking and robbery; and the J.S./E.G. incident included robbery, carjacking, and sexual offenses. None of the incidents carried the death penalty. Thus, this factor did not weigh against joinder.

Second, appellant seemingly argues that the J.S./E.G. and Martinez incidents involved inflammatory elements while the Weir robbery was "non-violent" and did not include such elements. (AOB 156-158.) But the relevant inquiry is whether some of the charges were *unusually likely* to inflame the

jury against the defendant. (*People v. Musselwhite*, *supra*,17 Cal.4th at p. 1243.) Neither the beating inflicted upon Martinez nor the sexual offenses forced upon J.S.–although certainly not common daily fare for most members of the public – were so unusually inflammatory as to prompt the jury to fail to weigh and consider the evidence implicating him in the Weir crimes and honestly assess his guilt. Thus, this factor did not weigh against joinder.

Finally, appellant argues that, although the evidence identifying appellant as one of the perpetrators of the Martinez attempted murder was strong, the evidence against him (as presented at the preliminary hearing) concerning the J.S./E.G. and Weir robberies was weak at the time of the motion. (AOB 159.) Because the DNA testing was not complete until April 1997 (6RT 2704-2705; 7RT 2766-2767), this information was not available for the trial court to utilize in assessing prejudice. However, the information before the trial court, which included the prosecution's offer of proof (1CT 237-242), demonstrated there was strong circumstantial evidence linking appellant to each of the three incidents. This factor, too, did not weigh in favor of severance.

It was appellant's burden below, and remains his burden on appeal, to demonstrate that the trial court's denial of his motion to sever "fell outside the bounds of reason." (See *People v. Manriquez, supra,* 37 Cal.4th at p. 573.) Because he fails to make that showing, his challenge to the first motion for severance should be denied.

C. The Court Properly Joined The Charges Arising From The Murder Of Koen Witters With The J.S./E.G., Weir, And Martinez Crimes

1. Denial Of Prosecution's Motion To Consolidate KA034540 (Drebert And Appellant) With KA030671

On January 24, 1997, an amended 14-count information (omitting a count 5) was filed under case number KA030671 naming appellant, Pritchard,

Vera, and Drebert as defendants. (IV Supp 1CT 277-288.) Thereafter, in Los Angeles County Superior Court case number KA034540, appellant and Michael Drebert were charged with the murder and burglary of Koen Witters and the burglary and robbery of Ruth and Patrick Weir. After being held to answer (2CT 361, 365, 385-536), an information was filed in case number KA034540 on April 14, 1997. (2CT 538-541.) Appellant pled not guilty and denied the special allegations. (2CT 542.)

On April 14, 1997, the People filed a motion to consolidate case number KA030671 (charging appellant, Pritchard, Vera, and Drebert) with case number KA034540 (Drebert and appellant). (2CT 545-558.) In the motion, the prosecution argued the cases were properly joined because they were the same class of crimes (2CT 554-555), were connected together in their commission (2CT 555-556), and the evidence was cross-admissible (2CT 556-558). On April 21, 1997, appellant filed objections to the prosecution's consolidation motion, conceding all of the crimes were of the same class (home invasion robberies) but arguing the rape case was prejudicially inflammatory, the Weir and J.S. offenses were weak as to appellant, only the murder charge carried the death penalty and the sheer number of counts would serve to prejudice appellant as to the capital count, and evidence of the crimes were not cross-admissible. (3CT 587-592.) The prosecution filed a reply on April 28, 1997, arguing that appellant had failed to meet his burden to demonstrate prejudice. (3CT 606-616.) Codefendant Vera also filed an opposition to the motion to consolidate. (3CT 631-636.)[31] On May 28, 1997,

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31. On April 15, 1997, appellant filed a motion to sever his trial from that of codefendant Drebert based upon *People v. Aranda, supra*, 63 Cal.2d at p. 530. (3CT 573-584.) The prosecution filed an opposition on April 28, 1997. (3CT 594-598.) The court denied the motion on May 27, 1997. (3CT 641.)

the prosecution filed a supplemental brief in support of its motion to consolidate. (3CT 643-646.)

A hearing on the motion was held on May 30, 1997. (1RT 127-129.) After eliciting that the prosecution would seek the death penalty as to appellant only (1RT 128), the trial court denied the consolidation motion based upon the following finding:

> As to the motion to consolidate, the court has reviewed the entire file, reviewed the People's theory, reviewed their concern. I think an overwhelming fact for this court is the undue prejudice for the defendants that are not involved in the alleged murder occurring on December 9th 1995. I think it would unduly taint their right to a fair trial and the court should deny the motion to consolidate as to case no. KA034540. We are at 3 of 30 on that case.

(1RT 128-129; 3CT 647.) Subsequently, the court clarified that it would permit consolidation of counts 4 and 5 of case number KA034540, which alleged the Weir offenses, but not as to counts 1 through 3. (1RT 129.)

2. The Prosecution's Motion To Sever Pritchard And Vera From Case Number KA030671 And Join KA034540 With The Severed Case Number KA030671 As To Appellant And Drebert

On June 5, 1997, the People filed an amended three-count information charging appellant and codefendant Drebert with the murder of Koen Witters (§ 187, subd. (a)) with special-circumstance allegations that the murder occurred during the commission of a residential burglary and robbery (§ 190.2, subd. (a)(17)), first degree residential burglary (§ 459), and first degree residential robbery (§ 211). (3CT 659-661.) On June 18, 1997, an amended information was filed against all four defendants in case number KA030671. (IV Supp 2CT 318-330.)

On September 3, 1997, in case number KA030671, the prosecution filed a motion to sever the charges pending against appellant and codefendant Drebert from the charges pending against codefendants Vera and Pritchard and to consolidate the charges against appellant and Drebert pending in case number KA030671 with the offenses charged in case number KA034540. (3CT 709-726.) The prosecution phrased the motion, not as a request for reconsideration of the prior ruling on consolidation but as "an alternative not considered at the time of the prior ruling: consolidation, for purposes of trial, of all charges pending against defendants Capistrano and Drebert only, the two special circumstance defendants." (3CT 712.) After reviewing the evidence of the various offenses that would be presented (3CT 713-719), the motion argued that the statutory requisites for joinder were met (3CT 719-721), the evidence of the Weir, Martinez, and J.S./E.G. crimes was cross-admissible as to Drebert to show the requisite intent (3CT 722-723), and that consolidation would promote judicial efficiency as to appellant since the Weir, J.S./E.G. and Martinez crimes "will be offered as evidence in aggravation should the Witters robbery-murder reach penalty phase." (3CT 723.)[32/]

The motion was heard on September 15, 1997, before the Honorable Robert A. Dukes. (1RT 171-182; 3CT 763-777.) At argument, the prosecution argued that the Witters, Weir and J.S./E.G. offenses shared a similar modus operandi, in that they were home invasion robberies in the San Gabriel Valley and the victims were tied up at gunpoint and robbed of personal property. (1RT 173-174.) Appellant's counsel argued that the capital murder charge was the weakest of the charges given its dependence upon appellant's statement to Gladys Santos, there was a danger the jury

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32. The written opposition referenced by appellant in his Opening Brief (AOB 142) is a copy of the opposition filed to the April 1997 motion for consolidation. (3CT 750-755; see 3CT 587-592.)

would be unable to separately evaluate the evidence of that crime given the other charges, and the modus operandi for these offenses was no more "common" than for most residential robberies and, therefore, was not particularly distinctive. (1RT 175-176.) Finally, appellant's counsel stated that appellant was not willing to waive additional time on case number KA030671. (1RT 176.)

The court observed that the capital trial would not be able to proceed within the time frame established for case number KA030671. (1RT 179-180.) Indeed, the court noted, "I believe that the counts are on -- are imminently severable and joinable on the capital case and -- but for the problem, the impossibility the court would have to accommodate under the time constraints, I would grant your motion." (1RT 180.) However, the court afforded the prosecution until 4:00 p.m. to file authorities in support of the proposition that the time constraints for case number KA034540 would apply to all of the joined counts. (1RT 180.)

On September 18, 1997, the trial court reconsidered and granted the prosecution's motion to sever the charges against Pritchard and Vera and join the charges as to appellant and Drebert in case number KA030671 with case number KA034540. (1RT 185-186; 3CT 778-779.) The court further overturned its prior ruling concerning the court's difficulty in obtaining jurors as follows:

> Upon reflection, the court came to the conclusion that as the counts are properly severable and joinable, that on a legal basis they should be, but the court's difficulty is not good cause to either continue over the counts [sic] – to continue the counts that are zero of ten beyond the ten days that had been raised, but that the court must accommodate the desire of the defendant in that regard.

So with that in mind, I have indicated or am indicating at this time that I am granting the motion to join the counts; that if all counsel are able to announce ready to proceed, that this Court will make a court available and jurors available. Along that line, I have counseled and communicated with Judge Reid, the supervising judge of criminal in the county, and it may necessitate ordering in panels of 35 jurors each day until we get a jury, but if that's what needs to be done, that needs to be done.

(1RT 186-187.)

Pursuant to the court's order for severance/consolidation of the cases against appellant and codefendant Drebert (see 1RT 188), on September 25, 1997, the Los Angeles County District Attorney filed an amended 16-count information consolidating the charges previously alleged in case numbers KA030671 and KA034540. (3CT 790-801.)[33]

3. The Trial Court Did Not Abuse Its Discretion In Joining The Witters Offenses

The trial court properly permitted appellant's case to proceed as a single trial, despite any supposed differences between his offenses. Though appellant endeavors to distinguish between the crimes on the basis of their relative prejudice, his attempt fails. There was no abuse of discretion.

Appellant fervently contends that the Martinez, Weir and J.S./E.G. offenses were not cross-admissible as to the Witters murder. (AOB 160-163.) As discussed above (Arg. VII.B.3, *ante*), the Martinez, Weir, and J.S./E.G. transactions were cross-admissible as presenting a common design or plan.

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33. Appellant mistakenly states that appellant alone was charged with the Martinez crimes. (AOB 142.) Both appellant and Drebert were charged with those offenses. (3CT 790-801.) Drebert was not charged with the crimes against J.S. and E.G. alleged in counts 4 through 10. (3CT 790-801.)

Common elements between these three incidents and the Witters murder made each incident cross-admissible to the Witters incident. In the J.S., and Weir crimes, multiple men with guns drawn accosted the victims after they drove into their detached garages on a December evening and forced them into their homes to ransack the residences and steal property. A modus operandi similar to that utilized in the J.S./E.G. and Weir incidents was suggested by the crime scene evidence presented at the Witters murder – Ms. Chen dropped Witters off at his apartment at 4:00 p.m. on December 9 as the winter evening hours approached, and Witters was discovered wearing swim trunks, suggesting that he had left the apartment for a swim and had been targeted as he was followed home.

Additionally, the Witters, Martinez, and J.S./E.G. crimes shared the common element of binding: J.S. and E.G. were bound with ties and belts taken from their closets; Martinez was bound with items taken from his closet; and Witters was bound with socks and videotape taken from his suitcase or apartment. Indeed, the particular use of personal items taken from the victims and the placement of the gags and ligatures in the various incidents strongly suggested the same perpetrator(s) committed all of the offenses. Thus, this factor did not weigh against joinder.

Again, the absence of cross-admissibility does not by itself demonstrate prejudice. (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 161.) Therefore, this Court must examine the other factors to determine if an abuse of discretion occurred. (*Ibid.*)

Admittedly, only the Witters murder carried the death penalty, but joinder did not convert the Witters charges, or any of the other incidents, into capital offenses, nor did it likely affect any verdicts. (See *People v. Ochoa, supra*, 26 Cal.4th at p. 423; *People v. Sandoval* (1992) 4 Cal.4th 155, 173.) Thus, this factor does not demonstrate an abuse of discretion.

Second, appellant argues that the rape scenario presented in the J.S./E.G. incident and the brutal beating inflicted upon Martinez could be viewed by a juror as "more inflammatory than the facts surrounding the Witters murder." (AOB 164-165.) The relevant inquiry is whether some of the charges were *unusually likely* to inflame the jury against the defendant. (*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1243.) The trial court was aware that appellant's own confession implicated him in the murder -- and the trial court (although not the jury) was aware that appellant's confession was corroborated by Drebert's videotaped statements to the police. Measured against the calculated strangulation of a bound and gagged Witters struggling for his life, neither the beating inflicted upon Martinez nor the sexual offenses forced upon J.S. were so unusually inflammatory as to prompt the jury to fail to weigh and consider the evidence implicating appellant in the Witters crimes and honestly assess his guilt. Thus, this factor did not weigh against joinder.

Third, appellant argues that, although the evidence identifying appellant as one of the perpetrators of the Martinez attempted murder was very strong and that recovered property, voice identification, and DNA evidence linked him to the Weir and J.S./E.G. crimes, the evidence against appellant concerning the Witters robbery and murder was weak in that it consisted solely of his admissions to Gladys Santos. (AOB 165-166.) However, it was not for the trial court, or for this Court, to assess Santos's credibility in determining whether joinder was appropriate. Based upon the information before the trial court, this factor did not weigh against joinder.

Because appellant did not meet his burden to demonstrate that the trial court's denial of his motion to sever "fell outside the bounds of reason" (see *People v. Manriquez, supra,* 37 Cal.4th at p. 573), his challenge to the joinder of the Witters offenses should be denied.

D. Appellant Has Not Shown Gross Unfairness Resulting From The Joinder

Aside from his attack on the trial court's denial of severance, appellant urges this Court to find that joinder resulted in a trial that was fundamentally unfair and, therefore, violated his right to due process guaranteed under the United States Constitution. (AOB 169-182.) The argument fails, as the refusal to sever appellant's trial did not compromise the fundamental fairness of the proceedings.

To gain relief under the Due Process Clause, a defendant must shoulder the heavy burden of demonstrating that the alleged error rendered the resulting trial fundamentally unfair. (See *Hollins v. Department of Corrections, State of Iowa* (8th Cir. 1992) 969 F.2d 606, 608; accord *People v. Ochoa* (1998) 19 Cal.4th 353, 409.) The Supreme Court has, therefore, held that "[i]mproper joinder does not, in itself, violate the Constitution. Rather, misjoinder . . . rise[s] to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his . . . right to a fair trial." (*United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8.) While undue prejudice may arise from the joinder of strong and weak cases, the federal courts agree with this Court that cross-admissible evidence dispels any potentially improper influence stemming from joinder. (*Sandoval v. Calderon* (9th Cir. 2001) 241 F.3d 765, 772, citing *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084-1085; *United States v. Johnson* (9th Cir. 1987) 820 F.2d 1065, 1070-1071; accord *People v. Osband* (1996) 13 Cal.4th 622, 666.)

Consistent with the federal authority, this Court has noted that "[e]ven if the ruling was correct when made, we must reverse if defendant shows that joinder actually resulted in 'gross unfairness,' amounting to a denial of due process." (*People v. Ochoa, supra*, 19 Cal.4th at p. 409, quoting *People v. Arias* (1996) 13 Cal.4th 92, 127.) In truth, the evidence establishing appellant

was the assailant in all the charged crimes was virtually conclusive, especially in light of his admissions, the stolen property recovered, and ultimately the DNA evidence. No gross unfairness occurred in this case, as all appellant's offenses "were quite inflammatory in nature," and the evidence as to each crime was strong and cross admissible, as demonstrated above. (See, *ante*, Arg. V.D, Arg.VI.E.)

Pulling isolated bits of testimony and the prosecutor's argument out of context, appellant misconstrues the evidence elicited and the prosecutor's argument to suggest "gross unfairness" resulted from the joinder of the charges. (AOB 170-182.) Appellant apparently concluded these points were too insubstantial to warrant separate challenges as evidentiary errors or assign as improper argument on a relevant theory. A review of the totality of the evidence presented and the argument of counsel abundantly demonstrates no impropriety occurred and that joinder did not result in fundamental unfairness.

Appellant urges a myopic view of the evidence in support of his assertion that the prosecutor improperly used the Martinez offenses to argue a "guilt by association theory." (AOB 170-174.) The prosecutor did not argue that appellant was guilty because he associated with other criminals. Rather, evidence that Pritchard, Vera, appellant and Drebert were always together, that appellant was the oldest, that Pritchard and Drebert referred to appellant as "Dad," and the booking information compiled when appellant, Drebert, Pritchard, and Vera were arrested all would have been admissible had separate trials been held for the J.S./E.G. and Weir incidents since that evidence circumstantially and properly established that appellant was the dominant robber and the rapist in the J.S./E.G. incident and a participant in the Weir offenses. DNA evidence, stolen property and his physical description linked appellant to the J.S. incident, and appellant's confession and stolen property linked him to the Weir incident.

Appellant argues that joinder of the Martinez offenses permitted the prosecutor to elicit testimony suggesting appellant, Pritchard, Vera, and Drebert had the physical appearance of gang members. (AOB 174-178.) However, the J.S./E.G. incident included references to gang insignia and a threat by the robbers that if the victims called the police, the robbers "homeboys" would harm them. (7RT 2925, 2928-2929; 8RT 3011, 3013-3014.) Also, appellant's physical appearance at the time of his arrest and at trial, which was consistent with the descriptions elicited from the trial witnesses, would have been before the jury even if each incident was tried separately. Indeed, according to the record, appellant himself had obvious gang tattoos on his hands and head that were too many to conceal from the jury. (1RT 1013; 11RT 4029-4032.) Similarly, Drebert's physical appearance was before appellant's jury since he was tried jointly with Drebert, and appellant does not challenge the joinder of his case with that of Drebert despite his claim of *Bruton* error (see Arg. VI, *ante*). Moreover, booking photographs and physical descriptions of all four defendants were admitted during the trial. (IV Supp 2CT 350-355; IV Supp 2CT 361-366.) Some, if not all, of these photographs and information, would have been admissible even if each incident had been tried separately. All four defendants were clearly relevant to the Martinez and J.S./E.G. offenses given the positive identification by Martinez and J.S.'s description of the robbers.

Furthermore, appellant complains the prosecutor's argument to the jury "exacerbated" the prejudice resulting from the joinder of the incidents. (AOB 178-181.) None of these arguments resulted in a trial that was fundamentally unfair.

In this case, the corpus delecti of the Witters murder were established by the crime scene investigation, which included the obvious ransacking of the apartment, and the autopsy. Appellant made a detailed and self-

corroborating confession to the murder of Koen Witters. His confession provided details that could only have been known by the killer or someone present when the murder occurred. Particularly, appellant's confession revealed that he had observed the victim shaving prior to entering the apartment to rob him (5RT 2442); investigating officers found shaving cream and stubble in Witters's bathroom sink. (5RT 2372). Appellant admitted strangling and cutting the victim (5RT 2439-2441, 2443); Witters was bound, gagged, strangled, and his wrists cut, and the small quantity of blood suggested Witters was dead or dying when the cuts were made (5RT 2368, 2370, 2382, 2389-2390; 7RT 2812-2820, 2831-2832). Witters's Apple MacIntosh computer was stolen during the robbery. (5RT 2344-2345, 2351-2354, 2357-2358, 2373-2376, 2381.) After the murder, appellant asked Santos if she knew anyone who wanted a desktop Apple MacIntosh computer. (5RT 2447-2448, 2461.) Appellant commented that the victim "liked to travel to Europe" (5RT 2447) and liked Asian women (5RT 2445, 2447); Witters was Belgian citizen, his girlfriend was Taiwanese, and a photograph of an Asian woman was found on his ransacked bed. (5RT 2334-2337, 2346-2348, 2371-2372.) Appellant's demonstration of how he used the belt to strangle Witters was consistent with the physical evidence. (5RT 2439-2441.)

There was abundant evidence of the Martinez robbery and attempted murder. While still hospitalized for his injuries, Martinez identified appellant, codefendant Drebert, Eric Pritchard and Jason Vera as his attackers. (4RT 2206-2210.) Martinez, Jose Canales, Gladys Santos and defense witness Jessica Rodriguez all confirmed that appellant was almost constantly present with Drebert, Pritchard and Vera. (4RT 2126-2129.) Indeed, Martinez, Santos and Rodriguez testified that they called appellant "Dad." (4RT 2165; 9RT 3284.) It was essentially undisputed at trial that appellant, who was the oldest and physically largest of the group, was the ringleader.

Evidence of the J.S./E.G. offenses was also compelling. J.S. positively identified Pritchard and Vera as two of the four robbers who invaded her home and terrorized her and her husband. She positively identified Pritchard as the perpetrator of one the forcible oral copulation counts. Her descriptions of the height and build of the four robbers circumstantially implicated appellant as the rapist and leader of the group. Moreover, appellant's identification as the leader was consistent with his role as leader of a group of young men who called him, "Dad." DNA evidence strongly linked appellant to the sexual offenses against J.S., which necessarily implicated him in the other crimes against J.S. and E.G. (7RT 2910-2921, 2943-2948.) And DNA testing conclusively excluded Drebert, Pritchard and Vera as donors of the sperm fraction of the vaginal swab taken from J.S. (7RT 2752-2754, 2756-2760.)

Additionally, there was strong evidence appellant committed the Weir robbery and carjacking. Appellant admitted robbing the Weirs in a conversation with Gladys Santos and had her drive him to a residence in West Covina that was near a school and was approximately four blocks from the Lido Apartments to recover coins he claimed to have taken during the robbery. Appellant told Santos they had taken Christmas presents, a white car, and groceries during the robbery and that a police officer lived in the house. When they reached the designated location, the coins were not where appellant had left them. (5RT 2449-2453.) Ruth Weir testified that the robbers stole a Ziplock sandwich bag containing commemorative coins, and one of her neighbors returned the coins to her approximately a week after the robbery. (8RT 3088-3090.) Moreover, Weir's neighbor identified a two-tone car similar to that driven by appellant's cousin, Jessica Rodriguez, as being outside the Weir home both before and immediately after the robbery. (8RT 3103-3104.) Appellant had been repeatedly seen in this car. Santos gave the

police eight gold chains belonging to Ruth Weir which she found inside a room of her apartment used by appellant's daughter. And a porcelain angel belonging to Ruth Weir that was found in the apartment Martinez shared with Amy Benson, when combined with Martinez's testimony that Benson hung around the complex with appellant, Pritchard, Drebert and Vera on a near daily basis, further linked appellant to the Weir robbery. (4RT 2165, 2172-2173.)

Appellant received a fundamentally fair trial, notwithstanding the joinder of charges. Any alleged error therefore fails to rise to constitutional proportion and did not prejudice the verdict. (See *United States v. Lane*, *supra*, 474 U.S. at p. 446, fn. 8; *People v. Ochoa, supra*, 19 Cal.4th at p. 409.)

VIII.

NO SUA SPONTE INSTRUCTION MORE SPECIFICALLY RESTRICTING CROSS-ADMISSIBILITY OR CONSIDERATION OF THE EVIDENCE WAS REQUIRED

Appellant's jury was instructed with a standard version of CALJIC No. 17.02 as follows: "Each count charges a distinct crime. You must decide each count separately. The defendant may be found guilty or not guilty of any or all of the crimes charged. Your finding as to each count must be stated in a separate verdict." (10RT 3748-3749; 5CT 1308.) Without specifying the actual language the trial court should have employed, appellant argues the failure of the trial court to sua sponte instruct the jury that it could not consider evidence of one charged offense to convict him of another charged offense prejudicially violated his state and federal constitutional rights to due process, to an unbiased jury, and to a reliable penalty determination. (AOB 184-197.) By failing to object to or request modification of the standard jury instruction in the court below (see 9RT 3335-3349; 10RT 3708-3709), appellant waived any claim that the instruction, as given, was erroneous. (See *People v. Geier* (2007) 41 Cal.4th 555, 599-600 [no sua sponte obligation to instruction jury to limit consideration of evidence to specific counts].) In any event, the trial court was under no sua sponte obligation to modify CALJIC No. 17.02 to inform the jury it should decide each count separately as if no other counts were charged. CALJIC No. 17.02 adequately conveyed to the jury that they were to decide each count charged against appellant separately. Additionally, despite appellant's claims to the contrary, evidence as to each count was cross-admissible pursuant to Evidence Code section 1101. (See Arg. VII, *ante*.) Moreover, this Court recently rejected similar arguments in *People v. Geier*, *supra*, 41 Cal.4th at pages 599-600. Appellant presents no

new or persuasive reason for a different result here. These claims should be rejected.

As appellant acknowledges, this Court has previously held that CALJIC No. 17.02 need not be modified sua sponte. (AOB 190 [referencing *People v. Beagle* (1972) 6 Cal.3d 441, 456, overruled on other grounds in *People v. Castro* (1985) 38 Cal.3d 301].) Without specifying the actual language the trial court should have employed, appellant argues that the trial court should have, sua sponte, given an instruction similar to instructions read to the juries in *People v. Holbrook* (1955) 45 Cal.2d 228, and *People v. Bias* (1959) 170 Cal.App.2d 502. (AOB 190-191.) Neither *Holbrook* nor *Bias* suggested, much less held, that a criminal defendant was entitled to sua sponte instructions that limited consideration of certain evidence to specific counts absent a request.

Appellant further points to this Court's decision in *People v. Catlin* (2001) 26 Cal.4th 81, to argue that this Court "recognize[d] that there is a difference between the right of the jury to consider all of the admissible evidence as supportive of guilt on all of the counts and the procedural concept of arriving at separate verdicts for each count." (AOB 192.) In *Catlin*, the defendant *requested* a special instruction that would have provided, "Evidence applicable to each offense charged must be considered as if it were the only accusation before the jury." (*Id.* at pp. 86-87.) This Court concluded the trial court correctly declined to give the instruction, noting that "under Evidence Code section 1101 the jury properly could consider other-crimes evidence in connection with each count, and also could consider evidence relevant to one of the charged counts as it considered the other charged count." (*Id.* at p. 87.) This Court by no means suggested any modification of CALJIC No. 17.02 would be required, sua sponte, without a request from a criminal defendant.

To the extent appellant now relies upon *People v. Armstead* (2002) 102 Cal.App.4th 784, to argue that the trial court's error in failing to *sua sponte* modify CALJIC No. 17.02 was further compounded by the court's instruction on defendant's presumption of innocence and the meaning of reasonable doubt pursuant to CALJIC No. 2.90 (AOB 196-197), unlike the situation presented in *Armstead*, here there is no evidence that appellant's jury misunderstood any instruction and was incapable of distinguishing between the charges and deciding each on its own merit.

Even assuming the trial court had a *sua sponte* obligation to modify CALJIC 17.02 to instruct the jury it should decide each count separately on the law and evidence applicable to it, any error is harmless because the evidence as to each count was very strong and there was no indication whatsoever that the jury did not decide each count on an individual basis. Appellant confessed the Witters murder to Gladys Santos. Michael Martinez positively identified appellant as his primary attacker, a porcelain angel taken during the Weir robbery was found in Martinez's apartment, appellant confessed the Weir robbery to Santos as he had her drive him to the Weir neighborhood to collect coins stashed after the robbery, property taken during the Martinez, Weir and J.S./E.G. incidents was left by appellant in Santos's apartment and turned over to the police, and DNA testing conclusively excluded Pritchard, Drebert and Vera as possible perpetrators of the rapes of J.S. but revealed that all nine genetic markers tested were consistent with appellant's DNA. Any error in not sua sponte modifying CALJIC No. 17.02 was harmless under any standard.

IX.

THE GUILT PHASE INSTRUCTIONS DID NOT IMPERMISSIBLY UNDERMINE OR DILUTE THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Appellant contends that the guilt phase jury instructions impermissibly reduced the prosecution's burden of proof and prejudicially violated appellant's constitutional rights. (AOB 198-236.) Appellant's claims as to CALJIC Nos. 1.00, 2.03, 2.01, 2.02, 2.21.1, 2.21.2, 2.22, 2.27, and 2.51 are meritless because this Court has previously rejected the identical arguments raised by appellant. Similarly, appellant's constitutional claims concerning CALJIC No. 2.15 have been previously rejected by this Court and his claim there was insufficient evidence to warrant the instruction lacks merit.

A. Circumstantial Evidence Instruction & Other Instructions

Appellant contends that various instructions given at the guilt phase undermined the requirement of proof beyond a reasonable doubt. (AOB 199-206.) Specifically, he contends that the instructions on circumstantial evidence (CALJIC Nos. 2.01, 2.02) "undermined the requirement of proof beyond a reasonable doubt" (AOB 199-203), while other instructions (CALJIC Nos. 1.00, 2.03, 2.21.1, 2.21.2, 2.22, and 2.27) "distorted the reasonable doubt standard" (AOB 203-206). This Court has previously rejected the identical arguments raised by appellant, and he proffers no persuasive reason to overturn this Court's precedent.

Appellant first maintains the instructions on circumstantial evidence (CALJIC Nos. 2.01, 2.02)–which effectively advised the jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable" (see 10RT 3714-3715; 5CT 1256,

1257)–permitted the jury to find him guilty "if he reasonably appeared guilty . . . even if they entertained a reasonable doubt as to his guilt." (AOB 200.) Appellant maintains the instructions "created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption by producing a reasonable exculpatory explanation." (AOB 201.) Thus, appellant argues the instructions "had the effect of reversing the burden of proof" by requiring appellant to come "forward with evidence explaining the incriminatory evidence put forward by the prosecution." (AOB 202.) In *People v. Nakahara* (2003) 30 Cal.4th 705, 714, this Court rejected the identical arguments raised by appellant and noted ". . . we have recently rejected these contentions and we see no reason to reconsider them." (See *People v. Guerra, supra*, 37 Cal.4th 1067, 1139 ["We have repeatedly rejected these arguments, and defendant offers no persuasive reason to reconsider our prior decisions."]; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1200.)

Appellant next contends that CALJIC Nos. 1.00 (regarding the respective duties of the judge and jury) misled the jury by informing them "that their duty was to decide whether appellant was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt." (AOB 203-204; see 10RT 3710-3711; 5CT 1250-1251.) This Court has rejected this identical claim. (See *People v. Guerra*, *supra*, 37 Cal.4th at p. 1139; *People v. Nakahara*, *supra*, 30 Cal.4th at p. 714; *People v. Frye*, *supra*, 18 Cal.4th at pp. 957-958.)

Appellant also urges that CALJIC No. 2.21.1 (discrepancies in testimony) and CALJIC No. 2.21.2 (witness willfully false) "lessened the prosecution's burden of proof" because the instructions "authorized the jury to reject the testimony of a witness 'willfully false in one material part of his or her testimony' unless 'from all the evidence, you believe the *probability of*

truth favors his or her testimony in other particulars.'" (AOB 204; see 10RT 3718-3719; 5CT 1262-1263.) The prosecution's burden of proof was thus lessened, appellant continues, because the instructions allowed the jury "to credit prosecution witnesses by finding only a 'mere probability of truth' in their testimony." (AOB 204.) However, "the targeted instruction says no such thing." (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 714, citing *People v. Hillhouse* (2002) 27 Cal.4th 469, 493, and *People v. Riel*, *supra*, 22 Cal.4th at p. 1200; see also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1139.)

Appellant also argues that CALJIC No. 2.22 (weighing conflicting testimony) improperly advised the jury "to determine which party has presented evidence that is comparatively more convincing than that presented by the other party." (See 10RT 3719; 5CT 1264.) And by doing so, appellant says, the instruction "replaced the constitutionally-mandated" reasonable doubt instruction with a standard which is "indistinguishable" from the preponderance of the evidence standard. (AOB 205.) As noted by this Court in *People v. Nakahara*, *supra*, 30 Cal.4th 705:

> we adopt the reasoning of Court of Appeal cases holding that CALJIC No. 2.22 is appropriate and unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof (see CALJIC No. 2.90).

(*People v. Nakahara*, *supra*, 30 Cal.4th at pp. 714-715.) As appellant's jury was instructed with the usual instructions on reasonable doubt, the presumption of innocence, and the prosecution's burden of proof (10RT 3720-3721; 5CT 1267-1268, 1274), appellant's challenge to CALJIC No. 2.22 must be rejected. (See also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1139.)

Appellant also contends that CALJIC No. 2.27 (sufficiency of testimony of one witness) was "flawed" because of its "erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts." (See 10RT 3719-3720; 5CT 1265.) He asserts that CALJIC No. 2.27, by telling the jury that "testimony of one witness which you believe concerning any fact is sufficient for the proof of that fact" and that "[y]ou should carefully review all the evidence upon which the proof of such fact exists," without qualifying this language to apply only to *prosecution* witnesses, permitted reasonable jurors to conclude that (1) appellant himself had the burden of convincing them that the homicide was not a first degree murder and (2) that this burden was a difficult one to meet. (AOB 206.)

This Court rejected appellant's contention in *People v. Turner* (1990) 50 Cal.3d 668, when it held that limiting CALJIC No. 2.27 to prosecution witnesses only would permit the defense witnesses an unwarranted aura of veracity. As explained in *People v. Montiel* (1993) 5 Cal.4th 877:

> We acknowledged [in *Turner*] some ambiguity in the modified instruction's undifferentiated reference to "proof" of "facts," but we made clear that application of the single-witness instruction [CALJIC No. 2.27] against the prosecution alone would accord the testimony of defense witnesses an unwarranted aura of veracity.

(*People v. Montiel*, *supra*, 5 Cal.4th at p. 941.)

Moreover, as in *Turner* and *Montiel*, given the instructions that the prosecution had the burden of proving the elements of the offenses beyond a reasonable doubt, it is difficult to "imagine that the generalized reference to 'proof' of 'facts' in CALJIC No. 2.27 would be construed by a reasonable jury to undermine these much-stressed principles." (*People v. Turner*, *supra*, 50 Cal.3d at p. 697; see *People v. Montiel*, *supra*, 5 Cal.4th at p. 941.) Accordingly, appellant's contention must be rejected.

Finally, as appellant correctly notes (AOB 232-233), this Court has rejected his claims as to the challenged instructions as lessening the prosecution's burden of proof and by operating as a mandatory conclusive presumption of guilt. He asks this Court to reconsider these holdings. (AOB 232-235.) However, appellant presents nothing new, persuasive or compelling in support of his request. Thus, there is no reason to reconsider these precedents. (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 714.)

B. CALJIC No. 2.51 Did Not Inform The Jurors That They Could Find Appellant Guilty Solely On The Basis Of Motive

Appellant asserts that CALJIC No. 2.51 (regarding motive) improperly allowed the jury to convict him on the basis of motive alone and shifted the burden of proof to appellant to show the absence of motive thereby lessening the prosecution's burden of proof. (AOB 207-212.) The jury was instructed with CALJIC No. 2.51 as follows:

> Motive is not an element of any of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. The presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show that the defendant is not guilty.

(10RT 3720; 5CT 1266.)

At the outset, appellant waived this claim by failing to request clarification at the time of trial. (See *People v. Guerra, supra,* 37 Cal.4th at p. 1134 [claim that motive instruction does not explicitly tell the jury that motive alone is an insufficient basis to convict waived where clarification was not requested at trial; however, claim that motive instruction shifted the prosecution's burden of proof was cognizable on appeal despite appellant's failure to object because it implicates his substantial rights]; *People v.*

Hillhouse, supra, 27 Cal.4th at p. 603.) Nevertheless, this Court has previously rejected this claim and theory, and appellant offers no reason for reconsideration of the issue. As this Court noted in *People v. Snow* (2003) 30 Cal.4th 43, "the instruction tells the jury that motive is not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish *all* the elements of murder." (*Id.* at p. 98; *People v. Guerra, supra*, 37 Cal.4th at p. 1134; *People v. Cleveland* (2004) 32 Cal.4th 704, 750.)

Appellant's assertion that the instruction diluted the prosecution's burden of proof because the jury would have been unable to distinguish between motive and intent concerning the robbery charges and robbery and burglary special circumstance allegations (AOB 209-212) has likewise been rejected, where, as here, the two terms were not used interchangeably and the jury was instructed that intent was a necessary element of robbery (10RT 3726-3727, 3735-3736; 5CT 1293, 1278) and burglary (10RT 3726-3727, 3734-3735; 5CT 1290, 1278). (See *People v. Guerra, supra,* 37 Cal.4th at p. 1134 [where jury was instructed on intent and the terms "intent "and "motive" were not referenced interchangeably, there was no reasonable likelihood that the jury understood those two terms to be synonymous]; *People v. Prieto* (2003) 30 Cal.4th 226, 254 ["no reasonable juror would misconstrue CALJIC No. 2.51 as 'a standard of proof instruction apart from the reasonable doubt standard set forth clearly in CALJIC No. 2.90'"]; *People v. Cash* (2002) 28 Cal.4th 703, 738-739; *People v. Hillhouse, supra,* 27 Cal.4th at p. 504.)

For the foregoing reasons, appellant's claim fails.

C. CALJIC No. 2.15

After both parties rested, a conference was held to discuss the jury instructions. (9RT 3335-3352.) Appellant's counsel did not voice an objection to or request modification or clarification of CALJIC No. 2.15. The

court instructed the jury with standard CALJIC No. 2.15 as follows:

> If you find that the defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crime of robbery, home invasion robbery in concert or carjacking. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating influence -- excuse me, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt.
>
> As corroboration, you may consider the attributes of possession [–] time, place and manner that the defendant had an opportunity to commit the crimes charged, the defendant's conduct, or any other evidence which tends to connect the defendant with the crimes charged.

(10RT 3716-3717; 5CT 1259.)

Appellant argues that CALJIC No. 2.15 created an improper permissive inference thereby impermissibly lightening the prosecution's burden of proof, improperly permitted the jury to use evidence of possession of stolen property to convict on unrelated crimes, and was unsupported by the evidence. (AOB 212-232.) Because appellant did object to the reading of CALJIC No. 2.15 in the trial court and did not request clarification or modification of the instruction, this claim is not preserved for appeal. In any event, this Court has repeatedly rejected appellant's claims that the instruction created an improper permissive inference, impermissibly lightened the prosecution's burden of proof, or improperly permitted the jury to use evidence of possession of stolen property to convict on unrelated crimes. (*People v. Prieto, supra*, 30 Cal.4th at pp. 248-249; *People v. Holt* (1997) 15 Cal.4th 619, 676, 677; see also *Barnes v. United States* (1973) 412 U.S. 837, 845-846.) Appellant offers no

new or persuasive reason for this Court to deviate from its prior holdings.

Nor could the jury have reasonably or logically interpreted and applied CALJIC No. 2.15 in the manner appellant proposes – to convict appellant of all of the charged offenses, including the murder, based upon a finding that he possessed stolen property from one of the incidents. (AOB 223-225.) Indeed, the instruction *specifically limited* its application to the crimes of robbery, home invasion, and carjacking (5CT 1259), thereby excluding the murder, attempted murder, and sexual offenses.

Nor was CALJIC No. 2.15 unsupported by the evidence presented. Relying upon this Court's decision in *People v. Morris* (1988) 46 Cal.3d 1, he argues the instruction was improperly given since a factual dispute existed whether he "possessed" the property taken from the Weir and J.S./E.G. robberies or whether there was property "stolen" from Koen Witters that appellant had ever possessed. (See AOB 225-229.) In *Morris*, this Court examined a prior version of CALJIC No. 2.15 that is substantially different from the instruction given in this case and observed, "where the evidence relating to 'possession' is conflicting or unclear, an *unqualified instruction* pursuant to CALJIC No. 2.15 should not be given, for it could easily mislead the jury into assuming that the defendant's possession has been established when, in actuality, the issue is in doubt." (*People v. Morris*, *supra*, 46 Cal.3d at p. 40, italics added.) The instruction given to the jury in *Morris* provided, "The mere fact that a person was in conscious possession of recently stolen property is not enough to justify his conviction of the crimes charged in the information. [¶] It is, however, a circumstance to be considered in connection with other evidence. To warrant a finding of guilty, there must be proof of other conduct or circumstances tending of themselves to establish guilt." (*Id.* at p. 40, fn. 16.) Here, the standard CALJIC No. 2.15 instruction directed the jury that it must resolve any factual dispute and find that appellant consciously

possessed recently stolen property as a prerequisite to considering the presumption. When and if this factual predicate was resolved against appellant, the jury was told it could not employ the presumption unless it also found corroborating evidence to support his guilt of the offenses. (5CT 1239.) Neither *Morris* or its precursor, *People v. Rubio* (1977) 71 Cal.App.3d 757, 768, controls here.

Thus, appellant's challenges to CALJIC No. 2.15 must be rejected.

X.

READING CALJIC NO. 17.41.1 AS PART OF THE GUILT-PHASE INSTRUCTIONS DID NOT VIOLATE APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS

Appellant contends that CALJIC No. 17.41.1 prejudicially violated his federal constitutional rights as guaranteed by the Sixth and Fourteenth Amendments. (AOB 237-244.) It appears appellant's jury was instructed with a version of CALJIC No. 17.41.1 as part of the guilt-phase instructions. (5CT 1326.)[34/] Appellant did not object to the reading of this instruction at his trial. (9RT 3335-3350; see also 9RT 3347 [the court describes the instruction as "a newly approved CALJIC instruction"].) Given the absence of an objection, this claim is not preserved for appeal.

In any event, the claim lacks merit and must be rejected. Appellant acknowledges that this Court rejected his constitutional arguments in *People v. Engelman* (2002) 28 Cal.4th 436, but he raises the claim to preserve federal review of the issue. (AOB 237.) This Court has subsequently considered and rejected similar, if not identical, contentions in the context of a capital case. (See *People v. Brown* (2004) 33 Cal.4th 382, 393 [instruction given over defense objection]; see also *People v. Barnwell* (July 26, 2007, S055528) __ Cal.4th ___, 2007 Daily Journal D.A.R. 11,385.) Appellant does not cite anything in the appellate record indicating the jurors in his case were improperly influenced by the instruction in their deliberations. Because

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34. The instruction provided, as follows:

> The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law and decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.

appellant makes no argument warranting reconsideration of the Court's conclusions in *Engelman* and *Brown*, this claim should be rejected.

XI.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT APPELLANT COULD BE CONVICTED OF FIRST DEGREE MURDER

Appellant contends that the trial court violated his constitutional rights under the federal and state Constitutions by instructing the jury that he could be convicted of first degree murder if he committed a deliberate and premeditated murder or if he committed the murder during the commission or attempted commission of robbery or burglary. Appellant argues the information specified only second degree malice-murder in violation of section 187; therefore, the trial court lacked jurisdiction to try appellant for first degree murder. Thus, appellant maintains his conviction for first degree murder must be reversed because he was convicted of an "uncharged crime." (AOB 245-252.) However, the record shows that the court properly instructed the jury on first degree murder.

Appellant's argument is based on the erroneous premise that the information specified a charge only of second degree murder. This is simply wrong. The information charged appellant as follows:

> On or about December 9, 1995, in the County of Los Angeles, the crime of MURDER, in violation of Penal Code Section 187(A), a felony, was committed by JOHN LEO CAPISTRANO and MICHAEL EUGENE DREBERT who did willfully, unlawfully, and with malice aforethought murder KOEN WITTERS, a human being.

(5CT 791.)

Contrary to appellant's assertion, the information clearly and plainly did not refer to second degree murder, but rather charged appellant with malice murder in violation of section 187. This Court has held for nearly a century that if the charging document charges the offense in the language of the statute (i.e., § 187), as is the case here, the offense charged includes both

degrees of murder and the defendant can legally be convicted of either first or second degree murder if warranted by the evidence. (See *People v. Witt* (1915) 170 Cal. 104, 107-108.)

In rejecting the claim that the defendant was improperly convicted of first degree murder on a felony murder theory where he was charged in the information only with "malice murder" as defined in section 187, this Court stated in *People v. Hughes* (2002) 27 Cal.4th 287:

> In summary, we reject, as contrary to our case law, the premise underlying defendant's assertion that felony murder and malice murder are two separate offenses. Accordingly, we also reject defendant's various claims that because the information charged him only with murder on a malice theory, and the trial court instructed the jury pursuant to both malice and a felony-murder theory, the general verdict convicting him of first degree murder must be reversed.

(*People v. Hughes*, *supra*, 27 Cal.4th at p. 370.) Thus, appellant's claim must be rejected since this Court has clearly and definitively spoken on the issue.

Appellant's entire argument is predicated on the erroneous premise that this Court's holding and rationale in *Witt* was undermined and implicitly overruled by this Court's decision in *People v. Dillon* (1983) 34 Cal.3d 441, a case which held, according to appellant, that "section 189 is the statutory enactment of the felony murder rule in California." Thus, the argument is that felony murder and premeditated murders are separate crimes and *Dillon* effectively overruled *Witt*'s holding that a defendant can be convicted of felony murder even though he is only charged with malice murder in the information. (AOB 248-251.) Unfortunately for appellant, this Court rejected this identical argument in *Hughes*:

> As the People observe, numerous appellate court decisions have rejected defendant's jurisdictional argument. We have rejected

> defendant's argument that felony murder and murder with malice are separate offenses (*Carpenter*, *supra*, 15 Cal.4th at pp. 394-395 [it is unnecessary for jurors to agree unanimously on a theory of first degree murder]; and, subsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely. Thus, we implicitly have rejected the argument that felony murder and murder with malice are separate crimes that must be pleaded separately.

(*People v. Hughes*, *supra*, 27 Cal.4th at p. 369.)

Finally, it must be noted that appellant's reliance on *Apprendi v. New Jersey* (2004) 530 U.S. 466 (AOB 251) is misplaced since, as shown above, appellant was not convicted of an "uncharged crime."

For all these reasons, this claim fails.

XII.

APPELLANT'S DEATH ELIGIBILITY DID NOT VIOLATE THE EIGHTH AMENDMENT OR INTERNATIONAL LAW

Appellant contends that his death sentence resulted solely from a felony-murder special circumstance rather than a finding he had a culpable state of mind and, therefore, is a disproportionate penalty under the Eighth Amendment and violates international law. (AOB 253-271.) He asks this Court to revisit its prior holdings rejecting his claim and "hold that the death penalty cannot be imposed unless the trier of fact finds that the defendant, whether the actual killer or an accomplice, had an intent to kill or acted with reckless indifference to human life." (AOB 263.) Appellant articulates no new or persuasive reason for this Court to revisit its prior repeated rejections of his Eighth Amendment claim. (*People v. Smithey* (1999) 20 Cal.4th 936, 1016; *People v. Earp* (1999) 20 Cal.4th 826, 905, fn. 15; *People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1294.)

As for appellant's claim that California's use of the death penalty violates international law, particularly, the International Covenant on Civil and Political Rights ("ICCPR") (AOB 267-268, 270-271), this Court has rejected the contention that the death penalty violates international law, evolving international norms of decency, or the ICCPR. (See *People v. Turner* (2004) 34 Cal.4th 406, 439-440; *People v. Brown*, *supra*, 33 Cal.4th at pp. 403-404; see also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1164 [international law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements]; *People v. Smith* (2005) 35 Cal.4th 334, 375 [same]; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511 [same].) Appellant's claim must therefore be rejected.

XIII.

CALJIC NO. 2.90, AS GIVEN TO THE JURY IN THIS CASE, WAS NOT CONSTITUTIONALLY DEFECTIVE

Appellant claims that CALJIC No. 2.90,[35] as read to appellant's jury, was constitutionally defective because it required jurors to articulate a reason for doubt in the charges, advised them that "possible doubt" did not equate to "reasonable doubt," failed to affirmatively instruct that the defense had no obligation to present or refute evidence, failed to explain that appellant's efforts to refute the prosecution's evidence did not shift the burden of proof, did not inform the jury that a conflict in the evidence or a lack of evidence could result in reasonable doubt, failed to inform the jury that the presumption of innocence continues throughout the trial, and improperly described the prosecution's burden as continuing "until" the contrary was proved. (AOB 272-285.) To the extent appellant argues that CALJIC No. 2.90 was simply inadequate, he has waived the claim. In order to preserve such a claim, appellant was required to bring his complaint to the trial court's attention. (See *People v. Johnson* (1993) 6 Cal.4th 1, 52.) But, in any event, appellant's

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35. Appellant's jury was read the following version of CALJIC No. 2.90:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(10RT 3724; 5CT 1274.)

claims are meritless because every court which has considered this version of CALJIC No. 2.90 has upheld the instruction. (See, e.g., *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286-1287 [listing numerous cases rejecting claims against constitutionality of CALJIC No. 2.90].)

A. CALJIC No. 2.90 Did Not Require That Jurors Articulate Reasonable Doubt

Appellant argues that, although the jurors were not expressly instructed that they were required to articulate reason and logic for any reasonable doubt, the instructional language of CALJIC No. 2.90 so implies. (AOB 272-274.) Respondent agrees that a jury is not required to articulate doubt. (See *People v. Hill* (1998) 17 Cal.4th 800, 831-832.) However, CALJIC No. 2.90 cannot reasonably be interpreted to require any articulation of doubt, expressly or impliedly. CALJIC No. 2.90, as discussed in Sections B through G, *post,* contained a proper definition of reasonable doubt which does absolutely nothing to shift the burden of proof.

B. CALJIC No. 2.90 Correctly Defined Reasonable Doubt

Appellant contends that CALJIC No. 2.90 unconstitutionally admonished the jury that a possible doubt is not a reasonable doubt. (AOB 274-277.) This claim has been rejected by both the United States Supreme Court and this Court.

In *Victor v. Nebraska* (1994) 511 U.S. 1, the defendant objected to the language in CALJIC No. 2.90 stating that reasonable doubt is "not a mere possible doubt." The Supreme Court held this language was adequate. (*Id.* at pp.13, 17.) This Court has also rejected appellant's claim. In *People v. Freeman* (1994) 8 Cal.4th 450, this Court revisited the then-existing version of CALJIC No. 2.90, following the federal high court's decision in *Victor v. Nebraska*. Based on *Victor*, this Court recommended trial courts delete the

"moral certainty" language from the former CALJIC No. 2.90.[36] This Court also recommended that trial courts use the *same definition* of reasonable doubt which the trial court used in the instant case. This included the language to which appellant now objects.[37] (*People v. Freeman*, *supra*, 8 Cal.4th at p. 504, fn. 9.) Indeed, this Court specified that, other than deleting the "moral evidence" and "moral certainty" language from the former CALJIC No. 2.90, *no other* changes should be made. (*Id.* at p. 505.)

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36. That version of CALJIC No. 2.90 provided as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on *moral evidence*, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty*, of the truth of the charge.

(Emphasis added.)

37. This Court recommended that CALJIC No. 2.90 be changed to read as follows:

> [Reasonable doubt] is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(*People v. Freeman*, *supra*, 8 Cal.4th at p. 504, fn. 9.)

Hence, CALJIC No. 2.90 properly sets forth the definition of reasonable doubt and is not confusing. Appellant's claim contradicts rulings by the United States Supreme Court and this Court. The claim must therefore be rejected.

C. CALJIC No. 2.90 Adequately Explained The Burden Of Proof

In two related claims, appellant contends that CALJIC No. 2.90 was deficient and misleading because it did not state that the defense had no obligation to present or refute evidence or that an attempt by him to refute prosecution evidence did not shift the burden of proof. (AOB 277-281, 281-282.) Respondent submits that CALJIC No. 2.90 clearly advised the jury that the prosecution, not the defense, had "the burden of proving [appellant] guilty beyond a reasonable doubt" and that the defense had no obligation of presenting evidence.

The first paragraph of CALJIC No. 2.90 clearly advised the jury that appellant had no obligation to present or refute evidence. It cloaked appellant in the presumption of innocence and squarely placed on the prosecution the burden of proving otherwise. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1134 [instruction that defendant need not prove his innocence or another's guilt properly refused in light of CALJIC No. 2.90]; *People v. Martinez* (1987) 191 Cal.App.3d 1372, 1378-1379 [CALJIC No. 2.90 cautioned jurors that People must prove defendant's guilt rather than defendant's having to prove his innocence or guilt of another].) No reasonable juror would have believed that appellant was required to present evidence to establish a reasonable doubt.

D. A Modification Setting Forth A Preponderance-of-the-Evidence Standard Would Have Been Erroneous

Appellant appears to contend that CALJIC No. 2.90 was incomplete and misleading because it failed to instruct the jury that if the evidence is in "equipoise, the party with the burden of proof loses." (AOB 282-283.) Such a modification to CALJIC No. 2.90 would have been inappropriate. The jury was properly instructed on the burden of proof. Had the trial court modified CALJIC No. 2.90 in the manner now suggested by appellant, it is likely appellant would now complain of error. (See *People v. Anderson* (1990) 52 Cal.3d 453, 472 [prosecutor's comment that, if the evidence is tied, the benefit goes to the defendant did not lessen the burden of proof in light of proper instruction pursuant to CALJIC No. 2.90 and defense counsel's explanation of burden of proof].)

E. CALJIC No. 2.90 Informed The Jury That The Presumption Of Innocence Continues Through To A Verdict

Appellant also posits that CALJIC No. 2.90 was deficient because "it did not assure that the jury would not shift the burden to the defense at some point prior to completing its deliberations." (AOB 283-284.) Respondent submits that the Court of Appeal properly acknowledged the scope of CALJIC No. 2.90 in *People v. Goldberg* (1984) 161 Cal.App.3d 170:

> Once an otherwise properly instructed jury is told that the presumption of innocence obtains until guilt is proven, it is obvious that the jury cannot find the defendant guilty until and unless they, as the fact-finding body, conclude guilt was proven beyond a reasonable doubt.

(*People v. Goldberg*, *supra*, 161 Cal.App.3d at pp. 189-190.) Since such a conclusion could not be reached prior to deliberation and unanimous agreement, the *Goldberg* court held CALJIC No. 2.90 effectively preserved the presumption up and until an unanimous agreement is reached. (*Id.* at p.

190.) Respondent submits that the *Goldberg* court was correct. Nothing in CALJIC No. 2.90 could be construed to permit burden shifting at some stage of the deliberations before its conclusion.

F. Use Of The Term "Until" Did Not Undermine The Prosecution's Burden Of Proof

In a related contention, appellant argues that the portion of CALJIC No. 2.90 which instructed the jury that a defendant "is presumed to be innocent until the contrary is proved" undermined the prosecution's burden of proof. He contends that the word "until" should be replaced by the word "unless" in order to indicate that sufficient proof might never be presented. (AOB 284-285.) This Court has rejected this contention. (*People v. Lewis* (2001) 25 Cal.4th 610, 651-652.) In *Lewis*, this Court concluded as follows:

> [T]here is no reasonable likelihood that the jury in defendant's case would understand the instruction to mean that to convict defendant, the state could sustain its burden without proving his guilt beyond a reasonable doubt. Here, the instruction first informed the jury that "a defendant in a criminal action is presumed to be innocent until the contrary is proved" and that if there is a reasonable doubt as to his guilt, he must be acquitted. The next sentence stated that the just-described presumption of innocence "places upon the People the burden of proving him guilty beyond a reasonable doubt." The jury was then provided a definition of reasonable doubt. Contrary to defendant's argument, there is no reasonable likelihood that the jury understood the disputed language to mean it should view defendant's guilt as a foregone conclusion.

(*Id.* at p. 652.)

Appellant offers no persuasive reason for this Court to depart from its decision in *Lewis*.

G. Appellant Was Not Prejudiced By The Giving Of The 1994 Revised Version Of CALJIC No. 2.90

Under the totality of the instructions given in this case (*People v. Snow*, *supra*, 30 Cal.4th at pp. 97-98; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1222, fn. 2; *People v. Burgener* (1986) 41 Cal.3d 505, 538), there was no reasonable likelihood the jury misconstrued or misapplied the words of CALJIC No. 2.90. (*People v. Clair*, *supra*, 2 Cal.4th at p. 663.) A full and fair reading of the instructions establishes that the jury could not have believed appellant had the burden of establishing his innocence or that the prosecution's burden of proof was something less than showing appellant's guilt beyond a reasonable doubt.

Appellant's challenges to CALJIC No. 2.90 must therefore be rejected. (See *People v. Hearon*, *supra*, 72 Cal.App.4th at pp. 1286-1287 [after listing the numerous courts which have rejected similar claims to CALJIC No. 2.90, the court determined that the issue is "conclusively settled adversely to defendant's position" and urged appellate attorneys "to take this frivolous contention off their menus"].

XIV.

THERE ARE NO GUILT PHASE ERRORS TO ACCUMULATE

Appellant argues that even if no single guilt-phase error acted to deprive him of a fair trial, the cumulative effect of the guilt phase errors he identifies in Opening Brief arguments V, VI, VII, VIII, and IX require reversal. (AOB 286-288.)

Respondent, however, has shown that none of appellant's contentions have merit. Moreover, appellant has failed to establish prejudice as to any of the claims he raises. Accordingly, his claim of cumulative error must be rejected. (*People v. Lewis, supra*, 25 Cal.4th at p. 635; *People v. Staten* (2000) 24 Cal.4th 464.)

XV.

A REVERSAL AS TO ANY INDIVIDUAL COUNT OR SPECIAL CIRCUMSTANCE DOES NOT WARRANT A PENALTY PHASE RETRIAL

Appellant claims that, should this Court reverse any count or special circumstance, the Court must vacate the death judgment and remand the cause for a new penalty trial. A reversal of any of the charges or allegations, argues appellant, "would significantly alter the landscape the jury was considering when making its determination to assess death." Failure to conduct a new penalty phase under such circumstances, he reasons, would violate the Eighth Amendment to the United States Constitution, as well as article I, section 17 of the California Constitution. (AOB 289-290.) The claim lacks merit.

First, appellant has not demonstrated in the instant appeal that there is any basis for this Court to set aside any conviction on any count or to reverse the true finding on the burglary-murder or robbery-murder special circumstances. Indeed, appellant does not even challenge the sufficiency of the evidence underlying any of the counts, special circumstances, or other enhancing allegations on appeal.

Second, contrary to appellant's claim, assuming arguendo this Court reverses one of the convictions, any such reversal would, given the overwhelming evidence presented at the penalty phase, not warrant reversal of the penalty determination. Appellant does not argue the penalty evidence was weak or insubstantial and, therefore, does not dispute this fact. Rather, appellant maintains that a harmless-error analysis at the penalty phase is inappropriate. He is wrong. The invalidation of a conviction or special circumstance is not prejudicial per se, but subject to harmless-error analysis. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 745-750; *Zant v. Stephens* (1983) 462 U.S. 862, 890-891 [fact that one aggravating factor may be found invalid does not mean death penalty may not stand where there are other valid

aggravating factors]; *People v. Hillhouse, supra,* 27 Cal.4th at p. 512 [invalid conviction for kidnaping for robbery, felony-murder theory, and felony-murder special circumstance did not require reversal of penalty]; *People v. Roberts* (1992) 2 Cal.4th 271, 327 [appellate court examines whether there is a reasonable possibility that the jury would have recommended a sentence of life without the possibility of parole]; *People v. Mickey* (1991) 54 Cal.3d 612, 703 [subject to harmless-error analysis].)

Moreover, a retrial of the penalty phase is not precluded under the United States Supreme Court decisions in *Ring v. Arizona* (2002) 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 466, as appellant maintains. (See AOB 290.) This Court has held that "[*Apprendi* and *Ring*] have no application to the penalty phase procedures of this state" (*People v. Prieto, supra,* 30 Cal.4th at pp. 262-264, 271-272, 275; *People v. Nakahara, supra,* 30 Cal.4th at pp. 721-722) and "*Ring* does not apply to California penalty phase proceedings" (*People v. Prieto, supra,* at pp. 262-263).[38/]

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38. *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849, does not stand for the proposition that reversal as to any count or special circumstance finding results in an automatic penalty phase retrial. (See AOB 290.) In *Silva*, the federal court determined trial counsel's ineffective performance was prejudicial where counsel had not investigated and presented mitigating evidence of family history and substance abuse at the penalty phase, the jury had asked questions about life without parole, three of four special circumstances found by the jury were subsequently invalidated by this Court, and an accomplice who was also convicted of two murders was sentenced to life without parole. (*Id.* at pp. 847-850.)

XVI.

APPELLANT'S UPPER TERM SENTENCES ON COUNTS 4 AND 9 SHOULD BE UPHELD

Appellant, referencing the Supreme Court's decisions in *Blakely v. Washington* (2004) 542 U.S. 296, and *Apprendi v. New Jersey, supra,* 530 U.S. at p. 466, contends the trial court denied his federal constitutional rights to due process and trial by jury by imposing upper term and consecutive sentences on the non-capital counts. (AOB 291-296.)[39/] Although the trial court initially selected upper terms for Counts 2, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, and 16 (12RT 4296-4298), the court imposed upper-terms as to two counts only – Count 4 (principal term and enhancement) and the firearm enhancement linked to Count 9. Because the trial court based the upper term sentence on Count 4 on appellant's recidivism, his challenge as to that count fails. Moreover, the trial court *permanently stayed* the sentences on all other counts pending execution of the death sentence for the Koen Witters murder as found in Count 1. (See 12RT 4302.) In light of the permanent stay imposed, so long as appellant's death judgment remains in place there is absolutely no risk that appellant will be exposed to a sentence on Count 4 or Count 9 that exceeds the statutory maximum punishment. (Compare *People v. Osband, supra*, 13 Cal.4th at pp. 622, 710 ["There is no risk of multiple punishments, because when the sentence for murder is carried out there will be no further punishment."].) Finally, because the upper-term enhancement imposed as to Count 9 was harmless beyond a reasonable doubt, appellant's challenge to that claim also fails.

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39. Appellant's Opening Brief was filed prior to the high court's decision in *Cunningham v. California* (2007) ___ U.S.___ [127 S.Ct. 856].

A. Relevant Sentencing Proceedings

Although the trial court initially selected upper terms for Counts 2, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, and 16 (12RT 4296-4298; 6CT 1492-1497), the court imposed imposed upper-term sentences in relation to two counts only – Count 4 and Count 9.[40/]

As to Count 9, appellant was sentenced to a term of 25 years to life pursuant to section 667.61, subdivision (a)(e) (12RT 4294) plus an upper-term section 12022.5, subdivision (a) firearm-use enhancement (12RT 4295). In light of the court's finding that consecutive sentences were warranted for Counts 4, 5, 10, 12, 13, 14 and 16, the court selected Count 4 as the principal term and imposed the upper term of nine years for the robbery in concert plus a 10-year upper term for the section 12022.5 enhancement. (12RT 4296, 4299; 6CT 1505-1506.) The court recalculated the sentences on Counts 5, 10, 12, 13, 14 and 16 pursuant to section 1170.1, subdivision (a) to be one-third of the mid-term for each of those counts and ordered that those sentences run consecutive to the sentence imposed on Count 4. (12RT 4299-4301; 6CT 1503-1505.)

In sentencing appellant to the upper-term firearm enhancement relating to Count 9, the trial court stated the reasons for its selection, as follows: "I am selecting the upper-term because, in my view, after considering the evidence, your use of this firearm was planned and premeditated, and the manner in which you chose to use this firearm showed a high degree of viciousness, callousness and cruelty." (12RT 4295.)

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40. The trial court stayed the sentences as to Counts 2 and 3 pursuant to section 654 (12RT 4301; 6CT 1499) and imposed concurrent terms as to Counts 6, 7, and 8 (12RT 4301; 6CT 1501-1502).

Before selecting Count 4 as the principal determinate term, the trial court made the following statement of reasons for selecting upper term sentences on all of the counts:

> Let me indicate for the record that as to each of those crimes, the high-term has been selected because each crime was, in the court's view, planned and premeditated. Each of the victims was particularly vulnerable, and they were surprised and outnumbered by you and by your associates. They were imprisoned, essentially, in their own homes. They were bound, and in some cases, gagged. Further, that you occupied a position of leadership, that you induced minors to participate in each of these crimes, that you have served at least one prior prison term, and that you were on parole from the state prison at the time that these crimes were committed.

(12RT 4298-4299.)

Concerning all of the firearm enhancements imposed, the trial court made the following statement of reasons:

> As to each of the firearm use allegations, the court has selected the high-term because, as previously indicated, the use of the firearm was planned and premeditated, and the manner of each use was indicative of a high degree of cruelty, viciousness and callousness.
>
> (12RT 4299.)

B. The *Cunningham* Decision

In *Cunningham*, the United States Supreme Court held that California's procedure for selecting upper terms violated the defendant's Sixth and Fourteenth Amendment right to jury trial because it gave "to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." (*Cunningham, supra,* 127 S.Ct. at p. 860.) The Court explained that "the Federal Constitution's jury-trial guarantee

proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Ibid.*)

C. The Upper Term On Count 4 Was Constitutional Based On Appellant's Criminal History

An upper term sentence based on at least one aggravating circumstance complying with *Cunningham* "renders a defendant *eligible* for the upper term sentence," so that "any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*People v. Black* (Jul. 19, 2007, S126182)____ Cal.4th____[2007 WL 2080875, p.* 6.] (*Black II*).) An aggravating circumstance accords with *Cunningham* if it was based on the defendant's criminal history. (*Black II, supra*, 2007 WL 2080875, at pp.* 9-10.) This "exception" for a defendant's "[r]ecidivism" must not be read "too narrowly" and encompasses "not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." (*Id.* at pp.* 10-12 [trial court's finding that prior convictions were numerous or of increasing seriousness falls within the exception]; *People v. Thomas* (2001) 91 Cal.App.4th 212, 220-223 [trial court's finding that the defendant had served a prior prison term falls within the exception], cited with approval in *Black II, supra,* 2007 WL 2080875, at p.* 11.)

In imposing the upper term as to Count 4, the trial court relied on appellant's criminal history, finding that appellant "ha[d] served at least one prior prison term, and that [he was] on parole from the state prison at the time that these crimes were committed." (12RT 4296, 4299.) This reliance was permissible under *Cunningham* and rendered appellant eligible for the upper term on Count 4. Under these circumstances, the trial court's reliance on

additional aggravating circumstance findings did not violate appellant's right to jury trial under *Cunningham*.

D. Any *Cunningham* Error Was Harmless

An appellate court properly finds *Cunningham* error harmless if it "concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury . . . ." (*People v. Sandoval* (Jul. 19, 2007, S148917) ___ Cal.4th ___ [2007 WL 2050897, p.* 6].)

Concerning the upper-term imposed on Count 4, a jury would have unquestionably concluded that appellant had served a prior prison term and was on parole at the time of the current offenses. (See 6CT 1589 [probation report].)

Concerning the upper term imposed for the firearm enhancements as to Count 4 (robbery) and Count 9 (forcible rape), appellant's use of the firearm was most certainly "planned and premeditated" (see Cal. Rules of Court, rule 4.421(a)(8)) as found by the trial court. Indeed, all of the participants were armed with guns, pressed them against the heads of J.S. and E.G. while threatening them, and taunted them with the weapons. Had a jury been asked to make this determination, it "unquestionably would have found true at least a single aggravating circumstance." (*People v. Sandoval*, *supra*, __ Cal.4th ___ [2007 WL 2050897, p.* 6].) Because the jury would have found true at least one of these facts beyond a reasonable doubt had they been presented at appellant's trial, any *Cunningham* error harmless. Accordingly, this Court should reject appellant's contention.

XVII.

THE TRIAL COURT PROPERLY IMPOSED CONSECUTIVE SENTENCES FOR APPELLANT'S CARJACKING CONVICTIONS IN COUNTS 10 AND 14

At sentencing, consecutive mid-term sentences were imposed for the carjacking convictions charged in Count 10 (J.S. and E.G.) and Count 14 (Weir). Appellant contends that the sentences on Count 10 and Count 14 must be stayed pursuant to section 654 because he also received consecutive sentences for the home invasion robberies convictions in Count 4, Count 5, and Count 12. (AOB 297-298.) As this Court observed in *People v. Osband, supra*, 13 Cal.4th at p. 622, because the trial court permanently stayed the sentences on Count 10 and Count 14 – and the other determinate and indeterminate sentences – pending execution of the death sentence for the Koen Witters murder, "There is no risk of multiple punishments, because when the sentence for murder is carried out there will be no further punishment." (*Id.* at p. 710.) Thus, should this Court affirm appellant's conviction and penalty judgment, it should conclude there was no error under section 654. In any event, because the jury verdicts necessarily included a finding that the home invasion robbery and carjacking offenses occurred at different times and places, the trial court's implicit finding that the crimes were not part of an indivisible transaction was supported by substantial evidence and should be upheld on appeal.

A. Relevant Sentencing Proceedings

At the sentencing hearing, defense counsel argued that the carjacking convictions in Counts 10 and 14 were premised upon the taking of car keys from the victims and were part of the robberies committed against those victims. (12RT 4280-4281.) The prosecutor responded that the carjackings were complete when the victims were led away from their cars. In contrast,

the robbery charges were based upon additional takings that occurred *after* the victims were taken into their homes. (12RT 4284-4285.) In ultimately ruling on this question, the trial court made the following factual determination:

> With respect to the carjacking counts, however, [defense counsel], I think I agree with [the prosecutor]'s analysis.
>
> It was the separation of the victims from their vehicles at the outset that constitutes the carjacking, and that crime was essentially complete prior to the entry [into] the residence of the Weirs and [J.S.] and [J.G.]

(12RT 4289.) Appellant received consecutive mid-term sentences for the crimes charged in Count 10 (three years, including the firearm enhancement) and Count 14 (20 months). (12RT 4299-4301.)

B. Legal Analysis

Section 654 provides, in relevant part, "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one." The purpose of section 654 "is to insure that defendant's punishment will be commensurate with his criminal liability." (*Neal v. State of California* (1960) 55 Cal.2d 11, 20-21.) "'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208; see, e.g., *People v. Beamon* (1973) 8 Cal.3d 625, 637 [defendant intended to kill his victims and arson merely a means to accomplish it].) Whether a defendant maintained multiple criminal objectives is primarily a question of fact for the trial court, whose finding will be upheld on appeal if there is substantial evidence to support it. (*People v.*

Osband, *supra*, 13 Cal.4th at p. 710; *People* v. *Coleman* (1989) 48 Cal.3d 112, 162.) Where a defendant commits offenses that were independent of and not merely incidental to each other, the defendant may be punished separately even though the offenses shared common acts or were part of an otherwise indivisible course of conduct. (*People v. Hicks* (1993) 6 Cal.4th 784, 789; *People v. Beamon*, *supra*, 8 Cal.3d at p. 639.)

In reviewing the factual determinations of the sentencing court, this Court views the evidence in the light most favorable to the judgment and presumes in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People* v. *McGuire* (1993) 14 Cal.App.4th 687, 698.)

Appellant relies upon *People v. Dominguez* (1995) 38 Cal.App.4th 410, and its observation that "the theft of several articles at the same time constitutes but one offense" to argue that section 654 precluded punishment on Count 10 and Count 14. (AOB 298.) In *Dominguez*, the defendant was convicted of robbery and carjacking. The trial court concluded that section 654 applied but imposed a concurrent sentence for the carjacking rather than staying the sentence. (*Id.* at pp. 419-420.) On appeal, the issue was whether the sentencing court should have stayed the sentence rather than imposing a concurrent term. The reviewing court relied upon the trial court's ruling that section 654 applied and observed that the robber's demand, "Give me everything you have," when viewed in combination with the victim's handing over his rings and simultaneously fleeing his van, indicated that the robbery and carjacking constituted one simultaneous act. (*Id.* at p. 420.)

In this case, appellant was not charged with mere robbery and carjacking for the Weir and E.G./J.S. incidents. Rather, it was alleged the robberies were conducted in concert inside an inhabited dwelling house. (3CT 793.) The jury was instructed on the additional elements for a violation

of section 213(a)(1)(A) (see 5CT 1296), and the jury found in its verdicts that the robberies charged in Count 4 (J.S.), Count 5 (E.G.), and Count 12 (Ruth Weir) were "committed by the defendants who voluntarily acted in concert and entered a structure pursuant to Section 213(a)(1)(A)" (5CT 1339, 1340, 1346).

This Court has previously held that a criminal defendant may be convicted of both simple robbery and carjacking for the *same conduct* but cannot be punished for both offenses when they constitute the same act. (*People v. Ortega* (1998) 19 Cal.4th 686, 700.) After appellant's trial and sentencing, this Court held in *People v. Lopez* (2003) 31 Cal.4th 1051, that a completed carjacking requires movement of the motor vehicle. (*Id.* at pp. 1062-1063.) As a result of this Court's holding in *Lopez*, it appears that, had the perpetrators not eventually moved the motor vehicles, the carjacking convictions charged in Count 10 and Count 14 could not be sustained on appeal.

Nevertheless, the trial court correctly reasoned that a new transaction began for section 654 purposes once appellant changed locations and took the victims into their homes and forcibly took property within the residence while acting in concert with two other perpetrators. Given the jury's findings, appellant's "robbery" conviction did not punish him for taking any personal property located outside of the victims' residences. Therefore, appellant did not receive multiple punishment for the same act.

In *People v. Green, supra*, 50 Cal.App.4th at p. 1076, the court concluded section 654 did not prohibit punishment for both the carjacking and robbery convictions. In that case, two men approached the victim in her car and demanded her purse. After she relinquished that item, one of the men got in the car and drove the victim to a secluded location, where he sexually assaulted the victim. Thereafter, he drove away in the victim's car. The

appellate court concluded that the separation in time and place between the initial robbery of the purse and the ultimate forcible taking of the vehicle supported the trial court's "finding the taking of the purse and the taking of the vehicle were separate incidents." (*Id.* at p. 1085.)

Here, the carjacking and home invasion robbery offenses were separated temporally and by location as in *Green*. J.S. and E.G., while inside their detached garage, were forcibly separated from their car at gunpoint after they returned home. (8RT 3003.) Similarly, Ruth Weir was forcibly separated from her car as she was returning to her detached garage to retrieve groceries from it. (8RT 8057-3063.) Indeed, concerning Ruth Weir (Count 14), her car was the only personal property taken from a location outside of her house; a de minimus amount of property (wallet) was taken from E.G. and J.S. while they were outside their home. Given the way the robbery offenses were charged and found true by the jury, the robbery offenses did not begin until the perpetrators entered the victims' residences. Given these circumstances, the trial court's conclusion that section 654 did not prohibit punishment for both the home invasion robberies (Counts 4, 5 and 12) and the carjackings offenses (Counts 10 and 14) was supported by substantial evidence and should be affirmed.

XVIII.

THE ABSTRACT OF JUDGMENT SHOULD BE CORRECTED TO REFLECT A CONSECUTIVE SENTENCE OF LIFE WITH THE POSSIBILITY OF PAROLE AS TO COUNT 15

As appellant notes (AOB 299), the trial court orally sentenced appellant on count 15 (attempted premeditated murder of Michael Martinez) to life in prison *with the possibility of parole* in accordance with section 664, subdivision (a) and ordered that the sentence on count 15 be served consecutive to the sentence imposed as to count 9. (12RT 4295-4296.) However, the abstract of judgment incorrectly reflects a sentence of life *without* the possibility of parole. (6CT 1539.)

This Court should exercise its power to correct this clerical error on appeal. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *In re Candelario* (1970) 3 Cal.3d 702, 705.)

XIX.

THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY AS TO THE BURDEN OF PROOF AT THE PENALTY PHASE

Next, appellant contends that the death penalty statute and the corresponding instructions given in the instant case failed to assign a burden of proof with regard to the jury's choice between the sentences of death and life without the possibility of parole. (AOB 300-333.) Specifically, appellant raises the following claims: (1) the death penalty statute and instructions unconstitutionally failed to assign to the State the burden of proving beyond a reasonable doubt the existence of an aggravating factor, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty (AOB 301-314); (2) the state and federal Constitutions require that the penalty jury be instructed that they may impose a sentence of death only if they are persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty (AOB 314-319); (3) the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution require that the State bear some burden of persuasion at the penalty phase (AOB 320-324); (4) the instructions violated the Sixth, Eighth, and Fourteenth Amendments by failing to require juror unanimity on aggravating factors (AOB 324-330); (5) the penalty jury should have been instructed on the absence of the need for unanimity on mitigating factors (AOB 330-332); and (6) the penalty jury should have been instructed on the presumption that life without the possibility of parole was the proper sentence (AOB 332-333). These claims are meritless.

This Court has specifically and repeatedly rejected each of the foregoing arguments and appellant has not presented this Court any new, persuasive, or compelling reason to reconsider its prior decisions. For example, this Court has held that the sentencing function at the penalty phase

is not susceptible to a burden-of-proof qualification. (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 589; *People v. Burgener* (2003) 29 Cal.4th 833, 885; *People v. Anderson*, *supra,* 25 Cal.4th at p. 601; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) Also, there is no requirement that the penalty jury be instructed concerning burden of proof – whether beyond a reasonable doubt or by preponderance of the evidence – as to existence of aggravating circumstances (other than other-crimes evidence), greater weight of aggravating circumstances over mitigating circumstances, or appropriateness of death sentence. There is also no requirement that the penalty jury achieve unanimity as to the aggravating circumstances (*People v. Samuels* (2005) 36 Cal.4th 96, 137) and there is no basis for a claim that the penalty jury must be instructed on the absence of a burden of proof (*People v. Cornwell* (2005) 37 Cal.4th 50, 104).

A trial court's failure to instruct that the reasonable doubt standard does not apply to mitigating factors does not violate a defendant's criminal rights, and neither does a failure to instruct that the jury needs to unanimously agree on such factors. (*People v. Panah* (2005) 35 Cal.4th 395, 499; see also *People v. Jablonski* (2006) 37 Cal.4th 774, 873; *People v. Sapp, supra*, 31 Cal.4th at p. 316.) Moreover, the absence of a requirement that the jury find death as the appropriate penalty beyond a reasonable doubt does not render the death penalty statute unconstitutional. (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 873; *People v. Stitely*, *supra*, 35 Cal.4th at p. 573.) And, no presumption exists in favor of either death or life imprisonment without the possibility of parole in determining the appropriate penalty, and thus such an instruction would have been improper. (*People v. Maury*, *supra*, 30 Cal.4th at p. 440; *People v. San Nicolas* (2004) 34 Cal.4th 614, 662-667; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1137; *People v. Arias*, *supra*, 13 Cal.4th at p. 190.)

Finally, contrary to appellant's assertion (see AOB 302-314), nothing in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, *Ring v. Arizona, supra,* 536 U.S. 584, or *Blakely v. Washington*, *supra*, 542 U.S. 296, impacts this Court's holdings that the sentencing function at the penalty phase is not susceptible to a burden-of-proof quantification. This Court has expressly rejected the argument that *Apprendi*, *Ring*, and/or *Blakely* affect California's death penalty law or otherwise justifies reconsideration of this Court's prior decisions on this point. (*People v. Ward* (2005) 36 Cal.4th 186, 221; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731; *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263; *People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32; *People v. Smith*, *supra*, 30 Cal.4th at p. 642.)

Accordingly, appellant's claims must be rejected.

XX.

CALJIC NO. 8.88, AS GIVEN TO THE JURY IN THIS CASE, PROPERLY DEFINED THE JURY'S SENTENCING DISCRETION

Appellant raises a variety of challenges to CALJIC No. 8.88, claiming that it inadequately defined the jury's sentencing discretion and the nature of its deliberations and violated his constitutional rights to a fair jury trial, a reliable penalty determination, and due process as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the federal Constitution and the corresponding provisions of the California Constitution. (AOB 334-345.) This Court has explained that the standard CALJIC penalty phase instructions "'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.'" (*People v. Gurule* (2002) 28 Cal.4th 557, 659, quoting *People v. Barnett* (1998) 17 Cal.4th 1044, 1176-1177; see also *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1192; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 593; *People v. Raley* (1992) 2 Cal.4th 870, 919-920.) As with his previous instructional claims, appellant offers no persuasive reason for this Court to reconsider these claims.

First, appellant takes issue with the use of the terms "substantial" and "warrants" in a single sentence of CALJIC No. 8.88: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (12RT 4260-4262; 6CT 1434-1435 [CALJIC No. 8.88].) Appellant argues the term "substantial" creates a standard too vague and ambiguous to provide constitutional guidance (AOB 335-338). The Court has rejected these claims. (*People v. Prieto, supra*, 30 Cal.4th at p. 273, and *People v. Boyette*, *supra*, 29 Cal.4th at p. 465.) Appellant's assertion that the instruction fails to make clear the standard of appropriateness for imposition of the death penalty because it contains the

word "warrants" (AOB 338-340) has also been squarely rejected. (See *People v. Boyette* (2002) 29 Cal.4th 381, 465; *People v. Breaux* (1991) 29 Cal.4th 381, 465.)

Similarly, appellant's contentions that the trial court was constitutionally compelled to instruct the jury that it shall impose a sentence of life without parole if it finds that the mitigating circumstances outweigh the aggravating circumstances, and that CALJIC No. 8.88 reduced the prosecution's burden of proof required by section 190.3, have been rejected. (See *People v. Gurule*, *supra*, 28 Cal.4th at p. 662.)

Appellant further argues that the omission of the language of section 190.3, that if the mitigating circumstances outweigh the aggravating circumstances" the jury "shall impose" a sentence of confinement in the state prison for life without the possibility of parole reduced the prosecution's burden of proof required by section 190.3. (AOB 341-344.) These claims have been rejected. (See *People v. Gurule, supra*, 28 Cal.4th at p. 662.)

Finally, noting that neither party bore the burden to persuade the jury concerning the appropriate penalty, appellant argues that CALJIC No. 8.88 was deficient because it failed to inform the jurors that he did not have to persuade the jurors that death was an inappropriate penalty. (AOB 345.) There is no basis for a claim that the penalty jury must be instructed on the absence of a burden of proof. (*People v. Cornwell, supra*, 37 Cal.4th at p. 104.)

In this case, CALJIC Nos. 8.85 and 8.88 fully and accurately conveyed to the jurors the applicable law governing their task in the penalty phase. CALJIC No. 8.84.1 instructed the jury that it must neither be influenced by bias nor prejudice against appellant, nor swayed by public opinion or public feelings. (5CT 1396.) CALJIC No. 8.85 enumerated the factors the jury were to consider in reaching its decision regarding penalty. (6CT 1413-1414.)

CALJIC No. 8.88 expressly instructed the jury to "consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances," and further cautioned the jury not to engage in a "mere mechanical counting of factors." (6CT 1434-1435.) These instructions adequately informed the jurors of their sentencing responsibilities. (*People v. Gurule*, *supra*, 28 Cal.4th at p. 659; *People v. Barnett*, *supra*, 17 Cal.4th at pp. 1176-1177; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1192; *People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 593; *People v. Raley*, *supra*, 2 Cal.4th at pp. 919-920.)

Nor was there any need to specially instruct the jury on the appropriate process of weighing mitigating factors. In this regard, CALJIC No. 8.88 properly advised the jury that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (6CT 1434-1435.) CALJIC No. 8.88 properly described the weighing process as "'merely a metaphor for the juror's personal determination that death is the appropriate penalty under all the circumstances.'" (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1244, quoting *People v. Johnson* (1992) 3 Cal.4th 1183, 1250; see also *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1161.)

XXI.

INTERCASE PROPORTIONALITY REVIEW IS NOT REQUIRED BY THE FEDERAL OR CALIFORNIA CONSTITUTIONS

Appellant also contends that the absence of intercase proportionality review from California's death penalty law violates his Eighth and Fourteenth Amendment right to be protected from the arbitrary and capricious imposition of capital punishment. (AOB 346-350.) this claim lacks merit.

Neither the federal nor state Constitutions require intercase proportionality review. (*People v. Jablonski, supra,* 37 Cal.4th at p. 837; *People v. Panah*, *supra*, 35 Cal.4th at p. 500; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1139.) The United States Supreme Court has held that intercase proportionality review is not constitutionally required in California (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54) and this Court has consistently declined to undertake it as a constitutional requirement (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 837; *People v. Panah*, *supra*, 35 Cal.4th at p. 500; *People v. Welch* (1999) 20 Cal.4th 701, 772; *People v. Majors* (1998) 18 Cal.4th 385, 432; *People v. Crittenden*, *supra*, 9 Cal.4th at pp. 156-157). Appellant's claim is thus meritless.

XXII.

APPELLANT'S SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW AND/OR THE EIGHTH AMENDMENT

Appellant contends California's use of the death penalty violates international law, the Eighth Amendment, and evolving standards of decency. (AOB 351-356.) In *People v. Boyer* (2006) 38 Cal.4th 412, 489, this Court squarely rejected this claim, stating that the Court has "consistently held that international law does not prohibit a death sentence rendered in accordance with state and federal constitutional and statutory requirements." (See also *People v. Hinton* (2006) 37 Cal.4th 839, 913; *People v. Smith*, *supra*, 35 Cal.4th at p. 375; *People v. Jenkins, supra,* 22 Cal.4th at p. 1055; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1225 [death penalty not cruel and unusual punishment in violation of the Eighth Amendment]; *People v. Samayoa* (1997) 15 Cal.4th 795, 864-865 [same]; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779 [the use of the death penalty as a regular form of punishment does not fall short of international norms of humanity and decency, and does not violate the Eighth Amendment].)

Because appellant has raised no novel question of fact or law that might require this Court to revisit its position on written penalty phase findings, it should reject the contention once again.

XXIII.

WRITTEN FINDINGS REGARDING FACTORS IN AGGRAVATION AND MITIGATION WERE NOT REQUIRED

Appellant contends the failure of California law to require written findings regarding the aggravating factors violates appellant's constitutional rights to due process, meaningful appellate review, and equal protection of the law as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 357-358.) Respondent submits no such findings were required.

Initially, respondent submits this contention has been waived. Appellant never presented his constitutional arguments below and, accordingly, has waived the issue on appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.)

Regardless, there exists no reason to grant relief on the waived claim. "Written findings by the penalty phase trier of fact are not constitutionally required." (*People v. Lewis, supra*, 25 Cal.4th at p. 677; see also *People v. Boyer, supra,* 38 Cal.4th at p. 485; *People v. Hinton, supra,* 37 Cal.4th at p. 913; *People v. Prieto, supra*, 30 Cal.4th at p. 275; *People v. Snow, supra*, 30 Cal.4th at p. 127; *People v. Gutierrez, supra,* 28 Cal.4th at pp. 1150-1151; *People v. Lucero* (2000) 23 Cal.4th 692, 741; *People v. Kraft* (2000) 23 Cal.4th 978, 1078; *People v. Rodriguez, supra*, 42 Cal.3d at pp. 777-779; see *People v. Frierson* (1979) 25 Cal.3d 142, 178-179 [rejecting claim that *Gregg v. Georgia* (1976) 428 U.S. 153 mandates jury make written findings].) Appellant has offered no authority on this question that did not exist on many past occasions in which this Court has entertained the instant claim. Because appellant has raised no novel question of fact or law that might require this Court to revisit its position on written penalty phase findings, it should reject the contention once again.

CONCLUSION

Based on the foregoing reasoning and authority, respondent respectfully urges this Court to exercise its power on appeal to correct the clerical error in the Abstract of Judgment concerning Count 15 and otherwise affirm appellant's convictions, his prison sentences, and his condemnation to death.

Dated: August 16, 2007

Respectfully submitted,

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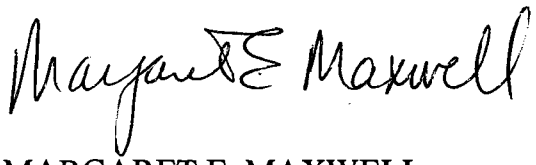

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 56933 words.

Dated: August 16, 2007

Respectfully submitted,

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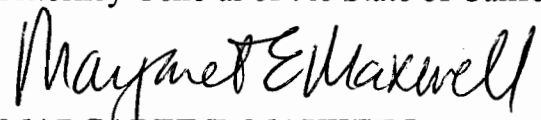

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Capistrano**
Case No.: **S067394 (Capital Case)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age and older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **August 16, 2007**, I served the attached

RESPONDENT'S BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **August 16, 2007**, at Los Angeles, California.

Nora Fung
Declarant

Signature

MEM:nf
LA1998XS2007
60234904.wpd

Case Name: **People v. Capistrano**

Case No.: **S067394 (Capital Case)**

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